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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1928.

THE ANN ARBOR RAILROAD COMPANY, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

No. [redacted]

Brief for
California Growers' and Shippers' Protective League, Intervener and Appellee.

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In the Supreme Court
OF THE
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October Term, 1928.

The Ann Arbor Railroad Company, et al., *Appellants*, vs. United States of America and Interstate Commerce Commission, *Appellees*.	No. 273

Brief for California Growers' and Shippers' Protective League, Intervener and Appellee.

STATEMENT OF THE CASE.

This is an appeal from a final decree of the United States District Court for the Northern District of California (specially constituted in accord with the provisions of the Urgent Deficiency Appropriations Act of October 22, 1913—38 Stat. L. 219) dismissing appellants' bill to enjoin the enforcement of an order of the Interstate Commerce Commission. The order of the Commission which appellants sought to have annulled required them to effect

certain reductions in rates for the transportation of fresh deciduous fruits, other than apples,[1] in carloads, from points in California to destinations in transcontinental rate groups A to M, inclusive. These lettered groups comprise the territory extending from Colorado Common Points—e. g., Denver, Cheyenne, Pueblo, etc.—to the Atlantic seaboard. The rate of $1.73 per hundred pounds,[2] with a carload minimum of 26,000 pounds, then in existence from California to points in Groups A to M, except Group J, was required to be reduced to $1.60, with a carload minimum of 30,000 pounds in the case of grapes and 26,000 pounds in the case of other fruits. Correspondingly, the rate of $1.62 to Group J (Colorado Common Points) was reduced to $1.50, with similar changes in the carload minima.

The rates prescribed by the Commission's order, together with the increased carload minimum on grapes, were established on February 10, 1928, and are still in full force and effect.

This brief is presented in behalf of the California Growers' and Shippers' Protective League, the intervener in this cause and the complainant in the proceeding before the Commission. Pursuant to the statutory provisions (Commerce Court Act, 36 Stat. L. 539, and Urgent Deficiency Appropriations Act, 38 Stat. L. 219) and to leave granted by the District Court (R. 70; 74), the California Growers' and Shippers' Protective League was allowed to intervene in behalf of the defendants.

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[1]The term "deciduous fruits" as used throughout this brief shall, unless otherwise expressly stated, mean "fresh deciduous fruits, other than apples".

[2]Rates are stated throughout this brief in dollars and cents per hundred pounds.

SUMMARY OF ARGUMENT.

Foreword.

A. Relation of Prescribed Rates on Deciduous Fruits to Rates on Other Perishable Commodities in California Rate Structure.

B. Compensating Effect of Increased Minimum Carload Weight on Grapes.

I.

Normal Exercise of Rate-making Power by the Commission.

The Commission found the prior rates unreasonable, in violation of Section 1 of the Act, and prescribed rates for the future in accordance with approved and accepted rate-making standards.

a. The complaint before the Commission.

b. The record before the Commission.

c. The report of the Commission.

d. The finding of unreasonableness.

e. Distinctions between the first and second proceedings before the Commission.

II.

Economic Considerations.

While the Commission may not competently require a rate reduction solely to meet the supposed necessities of industry, it may, after first finding existing rates unreasonable under Section 1 of the Act, take cognizance of economic conditions in aid of its rate-making functions.

III.

The Hoch-Smith Resolution.

The Hoch-Smith Resolution has been properly construed by the Commission, and, as so construed, the Resolution is valid.

A. Scope and purpose of the Hoch-Smith Resolution.

B. Pertinence of the Resolution to the present proceeding.

C. Standards of reasonableness required by Hoch-Smith Resolution.

1. Commission's construction of Resolution in relation to determination of reasonableness of existing rates.
2. Commission's construction of Resolution in relation to fixing reasonable rates for future application.
3. Validity of the Resolution as construed by the Commission.

D. Consideration of economic condition of the deciduous fruit industry.

E. Margin of profit required in fixing rates on commodities within terms of Hoch-Smith Resolution.

F. Interpretation of "freedom of movement."

G. Consideration of Section 15a of the Interstate Commerce Act.

IV.

Validity of Prescribed Rates.

The rates prescribed by the Commission for future application to the California deciduous fruit traffic have not been shown to be confiscatory.

a. Inconsistencies between cost studies.

b. The Wettling cost study.

c. The Erie Railroad cost study.

d. The Conrad cost study.

Particular fallacies in Conrad cost study.

1. Unwarranted use of 1923 costs.
2. Limited scope of the cost study.
3. Arbitrary allocation of expenses not directly assignable.
4. Weight of load not representative.
5. Excessive cost on the originating or Valley Division.
6. Improper inclusion of cost of ice-haulage.
7. Excessive allocation of car repairs and depreciation.
8. Empty car haul included in exclusive measure.
9. Inclusion of arbitrary percentage of cost of handling company material.
10. Improper extension of cost for weighted average haul.

Essential invalidity of processes followed in cost study.

V.

Findings and Order of the Commission.

The findings of the Commission are supported by the record and the order is sustained by the findings.

VI.

Scope of Judicial Review.

A rate-making order of the Commission will not be disturbed by the courts unless it is plainly in violation of statutory or constitutional restraints.

Summary and Conclusion.

Argument.

FOREWORD.

A.—Relation of Prescribed Rates on Deciduous Fruits to Rates on Other Perishable Commodities in California Rate Structure.

In order that the rates fixed by the Commission may appear in proper perspective, it is essential to view them in relation to the entire rate structure on fruits and vegetables from California to transcontinental destinations. To this end we reproduce herewith from page 35 of the Commission's report (R. 39) a table showing the rates on "the principal fruits and vegetables that move from California to the East". (For the purpose of convenient comparison, we have interpolated the rates prescribed by the Commission's order.)

COMMODITY	From California points to groups— A[1]	B[1]	C[1]	D,E	F,G,H	J	Minimum weight
	Cents	Cents	Cents	Cents	Cents	Cents	Pounds
Deciduous fruits							
Rates complained of	173	173	173	173	173	162	26,000
Rates prescribed	160	160	160	160	160	150	*30,000 †26,000
Apples	150	150	150	150	150	141	[2]31,000 [3]35,000
Oranges	155	155	155	155	155	155	36,000
Lemons	150	150	150	150	150	141	26,200
Fresh vegetables (pkgs.)	175	173	165	146	139	134	20,000
Melons	175	173	165	146	139	134	20,000
Cantaloupes	175	173	165	146	139	134	20,000
Vegetables (bags)	151	135.5	128	110	110	106	30,000
Cabbage, fresh (crates)	151	135.5	128	110	110	106	24,000

*Increased minimum weight on grapes.
†Minimum weight on tree fruits.
[1]Rates to Groups K, L and M are the same as to points in Groups A, B, and C, respectively.
[2]Cars under 32 feet 9 inches.
[3]Cars 32 feet 9 inches and over.

A comparative rate appraisal requires the consideration of such elements as minimum carload weights, average

loading, average length of haul, traffic volume, and value of commodities. The weight to be accorded such factors is properly within the discretion of the Commission. The Court is not concerned with the technical aspects of rate making, which proceeds from the exercise of a legislative function. Our immediate purpose is merely to show that the former rates on deciduous fruit were relatively higher than the rates on other perishables and that the prescribed rates are not out of harmony with the general rate structure. In point of fact, the prescribed rates are still comparatively high.

B.—Compensating Effect of Increased Minimum Carload Weight on Grapes.

Note should also be taken of the fact that the effect of the rate reduction on carload revenue was largely offset by an increase in the minimum carload weight on grapes. Concurrently with the establishment of the lower rates, the Commission authorized an increase in the minimum carload weight on grapes from 26,000 pounds to 30,000 pounds. *In brief, the freight rate was reduced by 7½%, while the minimum weight was increased by approximately 15½%.*

The compensating effect of the advanced minimum is of material importance. *The prior rate of $1.73 in conjunction with the 26,000-pound minimum yielded a minimum carload revenue of $449.80. The prescribed rate of $1.60 in conjunction with the new minimum of 30,000 pounds will yield a minimum carload revenue of $480.*

The preceding computation is upon the basis of minimum weights. In order to obtain a more exact criterion, con-

sideration must of course be given to average car-loading. Grapes represent approximately 80% of the entire deciduous fruit movement from California. It appears from the Commission's reort that in 1926 the total deciduous fruit movement required 74,456 cars, comprising 58,334 cars of grapes and 16,122 cars of tree fruits. (R. 19; Carriers' Exhibit No. 166, R. 412; see also brief of appellants, p. 9.) The average loading of all deciduous fruit in 1926 was 28,306 pounds. The loading of tree fruits only was 26,368 pounds. (R. 31; Exhibit No. 166, R. 412.) It is certain that the average loading of grapes will appreciably exceed the newly established 30,000-pound carload minimum. Witnesses for the complainant before the Commission testified that the average loading af grapes would approximate 31,000 pounds per car. (R. 169-170, 241, 244.) Assuming that the average loading of tree fruits will remain at 26,368 pounds as in 1926, a weighted average of the whole should approximate 30,000 pounds per car. (R. 241.)

The carriers' average revenue from the deciduous fruit movement in 1926 was $489.42 per car. The average revenue at the prescribed rate of $1.60 and an average loading of 30,000 pounds per car will be $480. *It therefore appears that the indicated reduction in carload revenue occasioned by the Commission's order is but $9.42 per car, or less than 2%.* The revenue effect of the Commission's order is thus found to be quite nominal.

* * * * * * *

These features have been placed in the foreground in order (1) to preclude any impression that the rates fixed

by the Commission represent a departure from conventional rate-making practice, and (2) to show that the rate reduction was in large measure offset by a concurrent increase in the minimum carload weight on grapes which preserved the carload revenue against appreciable impairment.

* * * * * * * *

It will be our endeavor to show that the Commission's order has proceeded from the legitimate exercise of its rate-making power, that the Hoch-Smith Resolution (43 Stat. L. 801, U. S. C., Title 49, section 55) has been properly construed by the Commission and that as so construed the Resolution is valid, that the rates prescribed by the Commission have not been shown to be confiscatory and that the findings of the Commission are fully sustained by the record.

I.

NORMAL EXERCISE OF RATE-MAKING POWER BY THE COMMISSION.

The Commission found the prior rates unreasonable, in violation of Section 1 of the Act, and prescribed rates for the future in accordance with approved and accepted rate-making standards.

Preliminarily, we desire to place in parallel the averment of the bill as to the Commission's construction of the word "unreasonable" and the language actually employed by the Commission in the construction of that term.

The bill charges that the word "unreasonable" as used by the Commission in its report (paragraph XI, R. 9)

> "does not refer to the test of reasonableness prescribed by law and by Section 1 of the Interstate Commerce Act, but refers instead to the mistaken and erroneous belief of the Commission that the Hoch-Smith Resolution creates a new and different standard of reasonableness * * *".

The Commission has not so held. The Commission says, quoting from a prior report in which the resolution was considered, (R. 26)

> "It (the resolution) sets no new standard of lawfulness, but provides, in effect, that to the extent that there are flexible limits to our discretion, we shall require the maintenance of the lowest rates falling within those flexible limits."

Moreover, the Commission expressly recognizes the controlling authority of Section 1 and other provisions of the Act (R. 27) and that, in prescribing rates for the future, it must hold to the "zone of reasonableness within which any rate is just and reasonable to the carrier as well as just, fair and reasonable to the shipper that utilizes the carrier's services". (R. 27, 28).

The appellants contend in their bill and upon the brief that the Commission did not find the previously established rates unreasonable under the provisions of Section 1 of the Interstate Commerce Act, but "based its action upon a supposed mandate found in certain language of the Hoch-Smith Resolution". (Brief of appellants, page 2). In different phrase, it is asserted that "The Commission construed the resolution as requiring it to reduce an existing rate on agricultural products, notwithstanding that the existing rate was reasonable, and otherwise lawful." (Brief of appellants, page 25).

The claim that the Commission disregarded Section 1 of the Act and that the order transcends its statutory authority is advanced in different allegations of the bill and is conveyed in varying terms by several assignments of error (Assignments Nos. VII, VIII, IX, X, XI, XIII, XIV, XV, XVI, XXXVIII, XXXIX, XL, XLVI, XLIX and LII—R. 111-125). In essence, a single issue is raised by these assignments, viz., the nature of the rate-making authority exercised by the Commission. We propose to meet that issue by a review of the complaint, the record before the Commission and the Commission's report.

a. The Complaint before the Commission.

The text of the complaint is reproduced upon pages 130-148 of the Record, both inclusive. The complaint alleges that the rates assailed are in violation of Sections 1 and 3 of the Interstate Commerce Act and of the principles declared in the Hoch-Smith Resolution. Paragraph VIII of the complaint (R. 146) recites that the rates are:

> "* * (1) unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act as amended, and (2) unduly and unreasonably prejudicial, in violation of Section 3 of said Act, and (3) higher than the lowest possible lawful rates compatible with the maintenance of adequate transportation service, and upon an unjust and unreasonable basis with relation to other rates, in violation of the joint resolution of Congress (S. J. Res. 107) commonly known and designated as the Hoch-Smith Resolution."

(Doubtless it is understood that the complaint was directed against rates which rested substantially at the war-time peak, despite the downward trend in the general rate structure and notwithstanding the material recession in

railway operating costs. It was the complainant's contention that the rates were unjust and unreasonable per se, that they imposed a disproportionate burden upon the deciduous fruit industry, and that their further maintenance threatened a curtailment of traffic to the prejudice of shippers and carriers alike.)

The complainant invoked the rate-making policy set forth in the Hoch-Smith Resolution. This was in aid of its attack upon the rates under the governing provisions of the Interstate Commerce Act. In proper course we shall show that the rate-making policy which finds expression in the Resolution is not novel and that it conflicts neither with the provisions of the Act nor with constitutional restraints.

b. The Record before the Commission.

It is but a statement of fact that by far the greater part of the hearing before the Commission was taken up in the receipt of evidence of the conventional character bearing upon the reasonableness and lawfulness of the rates. True, the complainant undertook to develop the economic importance of the deciduous fruit industry to the State of California and to the carriers which serve it, the severe depression which had descended upon the industry and the inability of the fruit growers longer to bear the burden of the existing freight rates. This economic showing was responsive to the Resolution, but it would have been proper and relevant alike if the Resolution had never existed. Economic elements are common to major rate cases. It is essential that the Commission shall know, in the interest

of shippers as well as carriers, the economic conditions which prevail in the particular industry in order that its rate-fixing functions may not be blindly administered. Without a full development of economic facts, the Commission could not exercise its authority advisedly within the "flexible limits of judgment which belongs to the power to make rates". In order to determine the proper measure of rates within those limits, the Commission must not be kept in ignorance of industrial conditions and economic needs.

Following the introduction of evidence of an economic character, the complainant undertook to establish the unreasonableness of the rates under Section 1. A comprehensive rate showing was made. The record contains seventy-six rate exhibits, of which fifty-one were offered for the complainant and twenty-five for the defendants. In addition, the record includes numerous exhibits of a traffic, operating and financial character. A mass of testimony was introduced, directed to the circumstances of traffic and of transportation. The volume of the movement, its essentially train-load character, its extraordinary persistence and the fact that it moves largely in the late summer and early fall when seasonal conditions are most conducive to minimum unit costs were fully developed. These and other factors responsive to the requirements of an important rate proceeding were presented with great elaboration on the part of the complainant and the defendants alike. The case was tried essentially as a rate case.

We shall not burden this brief either with a digest of the record or with a technical discussion of the evidence

directed to the reasonableness of the rates assailed. A catalog, in summary form, will suffice to disclose the nature and scope of the showing.

1. Rate history. (R. 229-230, Exhibit No. 28.)
2. Rate comparisons.
   a. Rates on deciduous fruits compared with rates on apples, oranges, lemons, cantaloupes and fresh vegetables. (R. 230-237, Exhibits Nos. 29-31.)
   b. Percentage increase in rates on deciduous fruits above prewar level (50.4%) compared with percentage increases in general level of eastbound transcontinental, westbound transcontinental and Mountain-Pacific rates (29%, 22% and 25%). (R. 237-242, Exhibits Nos. 32-39.)
   c. Comparison with increases in express rates on deciduous fruits from California to eastern destinations. (R. 199-203, Exhibits Nos. 8, 9, R. 241.)
   d. Comparison with rates on bananas, cocoanuts and pineapples. (R. 245-257, Exhibits Nos. 62-72.)
3. Circumstances of traffic and transportation.
   a. Fruit loaded in refrigerator cars and assembled into fruit blocks or trains at concentrating points. (R. 205-207, 329, 331, 373, 404, 408.)
   b. Movement during season of highest traffic density and lowest unit operating costs. (R. 241-242, 350, 403, 408.)

c. Essentially main line service. (R. 205-207, 332, 345, 350, 373, 380, 381, 404.)

d. Service relatively less expensive than in prior years. (R. 207-209, 331, 344, 376, 495, 496, 498, 503, 504.)

e. Lengthened fruit train schedules. (R. 207-209, 242, 331, 376.)

f. Increase in average tonnage per train. (R. 209, 331, 372.)

g. Increase in volume of movement. (R. 223-225, Exhibits Nos. 22-23, R. 409.)

h. Effect of tendered increase in carload minimum weight on grapes. (R. 169, 170, 241, 244.)

4. Financial condition of carriers. (R. 197-198, Exhibits Nos. 5-7; R. 242-243, R. fol. 346-391, Exhibits Nos. 40-61; R. 258, Exhibit No. 204.)

a. Improvement in carriers' earnings and recession in operating costs.

b. Decline in various unit costs of operation and maintenance.

Even a cursory review of the transcript will compel the conclusion that the case was presented primarily as a rate case, and that the economic showing responsive to the Resolution played a distinctly secondary role.

c. The Report of the Commission.

The report of the Commission, reproduced upon pages 16 to 59 of the transcript, may next be considered.

Following an introductory statement of the facts (R. 17-22) the Commission reviews the evidence bearing upon

the importance and economic state of the California deciduous fruit industry (R. 22-26). The Commission then considers the terms of the Resolution, concludes that "It sets no new standard of lawfulness", that the rates established must not run "counter to the provisions of the Interstate Commerce Act and the carriers' rights under the Constitution" and "must be somewhere within the zone of reasonableness permitted by the flexible limits of discretion reposed in us". (R. 26-28.)

The remainder, and by far the bulk, of the report, comprising the text from pages 28 to 57 inclusive of the record, is given over to a review of the evidence bearing directly upon the inherent reasonableness of the rates assailed. Without engaging in technical discussion, we may yet offer a brief summary in order to make it clear that the rates under attack were tested by accepted rate-making principles.

The Commission reviews the history of the rates on deciduous fruits from California to eastern defined territories (R. 28); a mass of rate comparisons offered by complainant (R. 29-38) and defendants (R. 39-43); traffic and transportation conditions surrounding the movement of deciduous fruits, such as the volume of the movement (R. 38), its seasonal nature (R. 38-39), the average loading (R. 39), the trainload character of the movement (R. 39), and the operating conditions encountered (R. 39, 43-44). The Commission likewise considers the character of the service performed by the carriers, including such matters as the method of handling the traffic (R. 43), the schedules under which it moves (R. 44-45), the cost of refrigerator equipment (R. 45), comparisons of the ratios

of the weight of the equipment to the weight of the paying load of various commodities (R. 45), the empty car haul involved (R. 45), the number of refrigerator cars provided for this movement (R. 45-46), the storage of empty refrigerator cars (R. 46), the extent of loss and damage claim payments (R. 46), special services at terminals (R. 46-47), and diversions and reconsignments (R. 47). Consideration is likewise given to evidence bearing upon the carriers' expenditures for wages, supplies and repairs (R. 47-48).

The Commission next addresses itself to "freedom of movement" and undertakes to determine the effect of a reduction in transportation charges (R. 48-49). In order to ascertain whether a rate reduction will be "compatible with the maintenance of adequate transportation service", an analysis is made of the operating returns of the carriers over a period of years (R. 49-51) and the rates of return on the carriers' property investment accounts (R. 51-53). Passing to cost of service, the Commission analyzes, but is unable to approve, certain cost studies offered by the carriers (R. 53-55). The status of the deciduous fruit industry in other parts of the country is considered and the conclusion is reached that no prejudice will be worked through a reduction in the rates from California (R. 55-56).

We repeat that *the Commission's report gives far more space to the treatment of the rate exhibits, the rate testimony, traffic and transportation conditions, the engineering and operating testimony and other evidence addressed to the reasonableness of the rates, than it gives to any other feature of the case.* If the Commission was not concerned with testing the reasonableness of the existing rates

under Section 1 of the Interstate Commerce Act, it is difficult to see why it should have devoted one-half of its original report to a discussion of matters which pertain only to the question of the reasonableness of the existing rates in accordance with accepted rate-making principles. (R. 28-48). If, as the appellants contend, the only issue was whether the existing rates were the "lowest possible lawful rates compatible with the maintenance of adequate transportation service", all of this discussion would have been irrelevant. Certainly the fact that the Commission took all of these matters into consideration indicates that the existing rates were properly tested by the ordinary standards of reasonableness under Section 1 of the Act.

It is impossible to review the report and yet avoid the conclusion that the Commission has given the major part of its attention to the consideration of evidence of the conventional type bearing directly upon the propriety of the rates assailed and upon the measure of the rates to be prescribed for future application. All essential elements of a comprehensive record were painstakingly reviewed and, exercising the discretion conferred by the Act, the Commission reached the conclusion that the existing rates were too high.

d. The Finding of Unreasonableness.

The appellants insist that there is no proper finding of unreasonableness in the report. In answer we quote the final paragraph of the report (R. 59):

> "We are of the opinion and find upon a consideration of the whole record that the rate of $1.73 as applied to the transcontinental shipment of deciduous fruits from California to Groups A to M, inclusive,

except Group J is, and for the future will be, unreasonable to the extent that it exceeds or will exceed $1.60; and that the rate of $1.62 currently applicable to Group J points is, and for the future will be, unreasonable to the extent that it exceeds or will exceed $1.50 and that such rates are the lowest possible lawful rates compatible with the maintenance of adequate transportation service, and are necessary to promote the freedom of movement by defendant of the specified products of agriculture, now affected by existing depression in agriculture. In publishing these rates defendants may increase the carload minimum on grapes to 30,000 pounds."

Responsive to the carriers' petition for reconsideration the case was again taken under advisement. In its report upon further consideration the Commission said (R. 68):

"On the whole record, we adhere to our former finding that the present rates are unreasonable and we are not convinced that the rates prescribed are below what are necessary to afford complainants the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

The appellants criticize this phrasing and insist that it was for the Commission to be convinced that the rates assailed were unreasonable. It is furthur argued that the Commission thereby placed upon the carriers the burden of justifying their tariff rates. This is not a correct appraisal of the Commission's action. In reply it will suffice to say that the clause last quoted does not appear in the original report but was responsive to a petition for reconsideration. No similar statement can be found in the original report. It was entirely proper for the Commission to say, *in response to the carriers' petition for re-*

consideration, that the carriers had failed to convince it that the rates prescribed were unduly low.

The statute does not prescribe that the finding of the Commission shall be in any particular form. It will be found, however, upon reviewing the initial report together with the supplemental report that there are express and sufficient findings of unreasonableness, predicated upon a careful and conscientious review of the record, and that the burden of justifying established rates was not imposed upon the carriers.

e. Distinctions between First and Second Proceedings before the Commission.

The appellants seek to find some significance in the fact that the conclusion reached by the full Commission in the instant case differs from the conclusion reached by a division of the Commission in the proceeding instituted by the same complainant which was heard in 1923, but was not decided until 1925. There is no doctrine of *res judicata* in rate proceedings. The Commission's functions are of a legislative character; its rate-making orders are prospective in operation. A conclusion reached on the 1923 record is not controlling in 1927. The following quotation from the opinion of the Supreme Court in

Virginian Railway Company v. United States, 272 U. S. 658, 71 L. ed. 463, 47 Sup. Ct. 222 (1926),

seems pertinent here:

> "• • • This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, *or with the alleged inconsistency with findings made in other proceedings before it.*"
>
> (Pages 665-666.) (Emphasis supplied.)

Apart from these considerations there are important elements of difference between the records in the two proceedings. These are catalogued by the Commission in its report (R. 57, 58). The most significant of the differences, according to our view, are the following:

1. The movement had increased from 69,777 carloads in 1923 to 86,795 carloads in 1925 and 78,803 carloads in 1926 (Brief of appellants, p. 9). Changes in traffic volume exert an influence upon the measure of rates.

2. The complainant offered a more comprehensive rate showing. In particular, 39 entirely new rate exhibits effectively covering the perishable rate structure of the United States were presented. (R. 245-270.)

3. The complainant tendered an increase in the carload minimum on grapes from 26,000 pounds to 30,000 pounds, a percentage increase of 15½%. It is recognized that the measure af rates in dollars and cents per hundred pounds may properly vary with changes in minimum weights.

4. The carriers' operating costs had materially declined and their financial condition had correspondingly improved.

(The summary appearing upon pages 43 and 44 of the brief of appellants is not complete.)

It is immaterial that the proceedings were instituted by the same complainant and were directed against the same rates. The records in the two proceedings were distinct

and the conclusion reached in the case heard in 1927 is not impeached by reason of a different conclusion reached upon a distinct record in the case heard in 1923.

II.

ECONOMIC CONSIDERATIONS.

While the Commission may not competently require a rate reduction solely to meet the supposed necessities of industry, it may, after first finding existing rates unreasonable under Section 1 of the Act, take cognizance of economic conditions in aid of the exercise of its rate-making functions.

The appellants argue that the Commission is without authority to regulate industry through the medium of regulating rates and, in alternative phrase, that a rate cannot be based upon the reason that it is to the advantage or disadvantage of certain industries or localities (Brief of appellants, pp. 118, 120, et seq.). The validity of of this declaration of principle may be conceded, but we deny that the order of the Commission in this cause is in derogation of the rule.

The Commission may not say: "This industry is in need of rate relief; we shall therefore reduce the rates upon its traffic". But the Commission may say: "We find upon the evidence of record that the rates assailed are unreasonable under Section 1 of the Act; in arriving at the measure of reasonable rates for future application we shall give consideration to the state of the industry and the financial requirements of the carriers".

It is expressly recognized in the brief of appellants that it is "no new principle in rate-making" to take into consideration "the conditions which at any given time prevail in our several industries to the end that commodities should freely move". (Brief of appellants, p. 64; see also brief of appellants, page 152.)

This distinction goes to the substance of things. It would be strange indeed if the Commission must be blind to economic facts in exercising its rate-making discretion. If it were subject to this inhibition the "zone of reasonableness" would shrink to a mere line. Rate-making would be reduced to a mechanical process. There would be no room for intelligent discrimination and all rates would be built upon a mathematical formula of cost and profit. They could not be responsive to the requirements of industry and commerce.

The law has placed no such fetters upon the Commission. That the Commission may weigh economic facts, always provided that it does not fix rates in response to the supposed necessities of industry, has received the definite sanction of the Supreme Court. To this it will suffice to cite the decision in

Interstate Commerce Commission v. Union Pacific Railroad Company et al., 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108 (1912).

This is a leading case and it is especially instructive because it fixes the line of demarcation between the powers reposed in the Commission and the powers which are denied to it.

The case involved attempted advances in the rates on lumber from the Pacific Northwest to the East. The Commission condemned the advances in part but allowed increases in certain of the rates. Upon the suit of the carriers, the United States District Court annulled the Commission's order. On appeal, the Commission's decision was sustained, the lower court being reversed. One of the objections earnestly pressed by the carriers against the order was that the Commission considered the effect of the attempted rate advances upon the lumber industry. The Commission's report clearly showed that it had examined and considered the economic state of the lumber industry and made an effort to determine its ability to bear an advance in rates. It also appeared that consideration had been given to the financial needs of the carriers. The Supreme Court, however, found that the objections of the carriers were without merit, since it appeared that the Commission's order was not made because of the effect of the advance on the lumber industry. The Court said (pages 554-555):

> "While there is language in the opinion which, looked at alone, might suggest that the Commission was attempting to decide more than the single question as to what was a reasonable rate, yet, taking the opinion as a whole, it affirmatively appears that the Commission confined itself to the exercise of its statutory powers to fix rates. *In its opinion it did discuss the issue of prosperity presented by mill men and carriers alike,* but held that—
>
> "* * * This controversy cannot be determined wholly upon the ground that complainants have enjoyed the lower rate for many years, and that interests have been built up thereunder, and that loss of

business investments, profits, and markets will result under the increased rates. It must be determined on the justness or reasonableness of the rates in controversy. * * * If the old rates were too low to be just and reasonable, complainants (mill men) cannot urge their loss as a ground for maintaining them; if the old rates were just and reasonable, the defendants cannot justify the advance on the ground of the prosperity of the lumber business.'

Considering the case as a whole, we cannot say that the order was made because of the effect of the advance on the lumber industry; nor because of a mistake of law as to presumption arising from the long continuance of the low rate, when the carrier was earning dividends; nor that there was no evidence to support the finding. If so, the Commission acted within its power, and, in view of the statute, its lawful orders cannot be enjoined. The decree, therefore, must be reversed." (Emphasis supplied.)

We think that this decision will effectively dispose of the contention that the Commission's order is invalid because it took cognizance of the economic distress of the California deciduous fruit industry. The Commission gave consideration to the economic facts, but only to assist its rate-making judgment after determining upon competent evidence that the prior rates were unreasonable. In passing upon the reasonableness of the rates assailed, it weighed the evidence which is pertinent to Section 1 of the Act; in prescribing rates for the future it kept expressly within the limits of its statutory powers.

III.

THE HOCH-SMITH RESOLUTION.

The Hoch-Smith Resolution has been properly construed by the Commission and, as so construed, the Resolution is valid.

The appellants' objective in this cause is to destroy the Hoch-Smith Resolution or at least to reduce it to impotence. It becomes important, therefore, to inquire into its purpose and scope, and finally to determine the validity of the construction imposed upon it by the Commission.

The Resolution is responsive to the determination of Congress (1) to remove the inequalities and injustices occasioned by the general percentage rate advances of 1918 and 1920 and by subsequent readjustments within the rate structure, and (2) to relieve agriculture from the disproportionate rate burden which has retarded its economic recovery. This is apparent from the report of the House Committee on Interstate and Foreign Commerce in connection with the Resolution. The following language contained in that report (House Report No. 735) is taken from page 57 of appellants' brief:

> "The present freight structure, which has grown up piecemeal and is the result of all sorts of local considerations, has long been out of adjustment. This maladjustment has been greatly increased by the flat, horizontal percentage increases in freight rates which have been made in recent years. These flat, horizontal increases were not scientific. The method used was grounded on expediency and the need for prompt action.
>
> * * * * * * *
>
> This improper distribution of the freight burden has borne particularly heavy on the products of the

> farm owing to the price deflation in those products. The present structure does not give proper weight to the question of what the traffic can fairly bear. The cost of service to the carriers is not the only factor that must be considered but the value of the service to the shipper as well."

The propriety of these objectives is self-evident. It will be our purpose to demonstrate the validity of the declaration of rate-making policy and to show that it has been neither misconstrued nor misapplied by the Commission.

In a preceding subdivision of this argument we have shown that the Commission's order in this cause has not proceeded from blind obedience to a supposed mandate of Congress. It has been shown, on the contrary, that the Commission acted upon evidence and that it was alert to keep within the limits of its statutory authority. The Commission has said, in effect:

> "This industry is within the terms of the Hoch-Smith Resolution. We must now determine whether the rates complained of are unreasonable when tested by accepted rate-making principles. If so found, we must fix rates for future application which shall be within the 'zone of reasonableness' as determined by established principles of rate-making and entirely lawful in accordance with all provisions of the Interstate Commerce Act, and which will also be the lowest rates which will promote the freedom of movement of these products and still insure the maintenance of adequate transportation service."

This is a correct appraisal of the Commission's course and we are satisfied that it is antagonistic neither to the terms nor the purpose of the Resolution.

A. Scope and purpose of the Hoch-Smith Resolution.

The Hoch-Smith Resolution (R. 514-516) has three objectives: *First*, it declares a rate-making policy. The first paragraph provides in brief "that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move". *Second*, it requires, by the second paragraph, a general investigation of the rate structure of the country with a view to removing the inequalities resulting from the general horizontal rate increases. *Third*, the Commission is directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement of products of agriculture affected by depression at the lowest possible lawful rates compatible with the maintenance of adequate transportation service. The latter direction will be found in the third paragraph of the Resolution.

(The repeated employment of the term "lawful" or its equivalent throughout the text of the Resolution is significant. The condition of industry may be considered "in so far as it is legally possible to do so"; changes in the rate structure must be "lawful", and products of agriculture affected by depression may be accorded "the lowest possible lawful rates * * *". The Resolution is effectively safeguarded against any construction which might be inconsistent with existing statutes or offend against provisions of the Constitution.)

At this moment we are not concerned with the rate structure investigation. Our concern is rather with the

declaration of rate-making policy. *In so far as this proceeding is concerned, the Hoch-Smith Resolution contains nothing which would lead the Commission to reach a result different from that which it could properly have reached without the aid of the Resolution.* The order of the Commission in this case could, without doubt, be sustained under the provisions of the Interstate Commerce Act, without reference to the Hoch-Smith Resolution, because the evidence convinced the Commission that the rates were unreasonable and in violation of Section 1 of the Act, and because reasonable rates were prescribed for the future.

The rate-making policy declared in the Resolution is not novel—in fact, it is as old as American railroading. Moreover, it is in conformity with sound economic principles. This is but a re-phrasing of the accepted principle of "charging what the traffic will bear". It has long been recognized that all commodities cannot contribute in equal measure either to the carriers' costs or the carriers' profits.

Northern Pacific Railway Company v. North Dakota, 236 U. S. 585, 59 L. ed. 735, 35 Sup. Ct. 429 (1915);

Norfolk & Western Railway Company v. Conley, 236 U. S. 605, 59 L. ed. 745, 35 Sup. Ct. 437 (1915);

Minneapolis & St. Louis Railroad Company v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. 900 (1902);

Atchison, Topeka & Santa Fe Railway Company v. United States, 203 Fed. 56 (Com. Ct. 1913),

affirmed in 231 U. S. 736, 58 L. ed. 460, 34 Sup. Ct. 316;

Investigation and Suspension Docket 26 to 26-C, 22 I. C. C. 604, 623-624 (1912).

Consideration must be given to "what the traffic will bear", i. e., the ability of freight of high value to bear substantial rates and, correlatively, the inability of freight of lower value to carry rates in similar measure. This principle, expressed in varying terms, has always played a leading role in railroad rate-making.

In the first of the cases last above cited (*Northern Pacific Railway Company v. North Dakota*) the Supreme Court expressly recognizes the necessity of permitting a wide range of discretion in the exercise of the rate-making power. It is said in particular that there is no duty "to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business". The following is quoted from the opinion of the court (pp. 598-599):

> "The legislature, undoubtedly, has a wide range of discretion in the exercise of the power to prescribe reasonable charges and *it is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business.* There are many factors to be considered,—differences in the articles transported, the care required, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications." (Emphasis supplied.)

The wide range of administrative discretion necessarily reposed in the Commission has perhaps never received

clearer exposition than in the opinion of Commissioner Franklin K. Lane in *I. & S. Docket 26 to 26-C, supra.* We feel warranted in offering a somewhat extended excerpt from this opinion (pp. 623-624):

> "If a carrier may raise all rates to a basis where each will bear its share of cost, including all costs, and no lower rate is reasonable, then it must follow that all rates are unreasonable which yield to the carrier a greater return than such cost. Under such theory what would be the rate on tea or silks, high-priced horses, or delicate machines? Is there to be no classification of freight excepting upon the basis of cost of transportation plus insurance risk? If so the tariffs of every railroad in the United States must suffer a revolutionary change. *In all classification consideration must be given to what may be termed public policy, the advantage to the community of having some kinds of freight carried at a less rate than other kinds. And this is the true meaning of the phrase 'what the traffic will bear'. It expresses the consideration that must be shown by the traffic manager to the need of the people for certain commodities.* He accordingly imposes a higher rate upon what may be termed luxuries as compared with that imposed upon those articles for which there is a more universal demand. He also gives consideration to the fact that the rate so imposed enters into the ultimate price to the consumer to but a small degree when the article is one of high value, and that those in the community who can afford to purchase such articles can well afford to pay a rate greater than that which could reasonably be imposed upon the general public for commodities of common use. In this sense what the traffic will bear and the value of the service are analogous. No one would claim that a carrier was violating its duty under the law in charging three times the rate upon oriental rugs that it imposed upon cotton. This would not be undue

discrimination as between commodities, even though it costs no more to transport the rugs than it did the cotton, assuming both to be carried at the owner's risk, for the one does not compete with the other, and one may reasonably bear a higher rate than the other upon public grounds. It must be, therefore, that this Commission, under the amendment to section 1 passed by Congress in 1910, giving to us the control of freight classification, has power to determine the reasonableness of the differences that are made between the rates made applicable to the various kinds of commodities transported. We may not say that a rate shall be fixed so as to meet the requirements or needs of any body of shippers in their efforts to reach a given market, nor may we establish rates upon any articles so low that they will not return out-of-pocket cost. Neither could we fix an entire schedule of rates which would yield an inadequate return upon the fair value of the property used in the service given. *There is, however, a zone within which we may properly exercise 'the flexible limit of judgment which belongs to the power to fix rates'.* These are the words of the Chief Justice of the Supreme Court, 206 U. S., 26. *There is no flexible limit of judgment if all rates must be upon a level of cost, and out of every dollar paid to the carrier must come a fixed amount of return for capital invested.* The recognition of such a doctrine has never been suggested either by Congress or the Supreme Court. A just and reasonable rate must be one which respects alike the carriers' deserts and the character of the traffic. It can not be a rate that takes from the carrier a profit and thus favors the shipper at the carrier's expense, nor is it one which compels the shipper to yield for the transportation given a sum disproportionate either to the service given by the carrier or to the service rendered to the shipper. The words 'just and reasonable' imply the application of good judgment and fairness, of common sense and a sense of justice to a given condition of facts. They are not fixed, unalterable, mathematical terms.

> Their meaning implies the exercise of judgment, and against the improper exercise of that judgment the Constitution gives protection, at least as far as the carriers are concerned." (Emphasis supplied)

Such was the law, and such was the practice of the Commission in its administration, many years before the Hoch-Smith Resolution came into being.

Under the terms of the Resolution, the rates which the Commission may prescribe must be *lawful*, i. e., they must be reasonably compensatory. They must suffice to meet the expense of service and contribute fairly to profit. The Commission's freedom of action in rate-making must be exerted within the upper and lower limits of reasonableness.

Entirely without the aid of any direction on the part of Congress, the Commission may, upon finding rates unreasonable under Section 1, appropriately exercise its rate-making discretion within the zone of reasonableness in order to insure freedom of movement. Before the passage of the Resolution the Commission pursued this course in important cases dealing with agricultural products.

> *Re Transportation of Wool, Hides and Pelts*, 23 I. C. C. 151, 156, (1912);
>
> *Rates on Grain, Grain Products and Hay*, 64 I. C. C. 85 (1921);
>
> *Fertilizer and Fertilizer Materials*, 113 I. C. C. 389 (1926).

If this is competent for the Commission in the absence of express legislative direction, it is equally competent for

Congress to recognize the existence of a depression in agriculture—an industry whose welfare is of far-reaching public importance—and to direct the Commission to follow that rate-making policy in dealing with agricultural products affected by depression. In neither case are Constitutional safeguards disregarded, since the Commission may in no event prescribe rates which are unlawful.

The Resolution cannot be found objectionable on the ground that the language of the final paragraph is confined to "the products of agriculture affected by that depression". This is but a direction to the Commission that, in applying the general rate-making policy which is conveyed by the first paragraph, it shall, as the appellants so aptly phrase it (brief of appellants, page 70), give "first aid and attention to agriculture". It will not be doubted that the situation of agriculture at the time of the passage of the Resolution justified Congress in directing special attention to that industry and asking the Commission to effect with the least practicable delay *lawful* changes in rates on such of those products as were affected by depression. *The Supreme Court has expressly recognized that the legislature may competently enact statutes for the protection and encouragement of agriculture.*

In

Liberty Warehouse Company v. Burley Tobacco Growers' Co-operative Marketing Association, 276 U. S. 71, 48 Sup. Ct. 291 (1928),

a Kentucky statute known as the Bingham Co-operative Marketing Act (Laws Ky. 1922, c. 1) was alleged to be in

violation of the Fourteenth Amendment to the Constitution of the United States. In holding the act constitutional, the Supreme Court said (page 96):

> "* * * * *This court has recognized as permissible some discrimination intended to encourage agriculture.* American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 95, 21 S. Ct. 43, 45 L. Ed. 102; Cox v. Texas, 202 U. S. 446, 26 S. Ct. 671, 50 L. Ed. 1099." (Emphasis supplied.)

In

> *American Sugar Refining Company v. Louisiana,* 179 U. S. 89, 45 L. Ed. 102, 21 Sup. Ct. 43, (1900),

the Supreme Court sustained a statute of Louisiana which imposed a license tax upon persons and corporations carrying on the business of refining sugar and molasses and which expressly exempted from its operation planters and farmers grinding and refining their own sugar and molasses. We quote from page 95 of the opinion in that case:

> "* * * *The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws."* (Emphasis supplied.)

See also

> *Cox v. Texas,* 202 U. S. 446, 50 L. Ed. 1099, 26 Sup. Ct. 671 (1906).

If it is proper for a state legislature to favor agriculture, a correlative power is reposed in Congress.

The settled rule that it is competent for Congress to encourage co-operative marketing of agricultural products and to relieve such co-operative marketing organizations from the restraints of anti-trust laws is exemplified by the opinion of the court in

Frost v. Corporation Commission of Oklahoma, 26 F. (2d) 508 (D. C. Okla. 1927).

In that case the court said (page 515):

> "The encouragement of co-operative marketing on the part of the producers of agricultural products, which includes agriculture, horticulture, viticulture, dairy products, live stock, and the products thereof, the products of poultry and bee raising, the edible products of forestry, and any and all products raised or produced on farms, and possessed or manufactured products thereof, transported or intended to be transported in interstate or foreign commerce, appears to be a declared policy on the part of the United States. See section 451, c. 18, tit. 7, Code of Laws of the United States in force December 6, 1926, 44 United States Statutes at Large, 69th Congress 1925-1926, pt. 1 (7 USCA Sec. 451)."

In addition to the Co-operative Marketing Act of 1926 (44 Stat. L. 802, U. S. C., Title 7, sections 451-457), referred to in the *Frost* case, see also the Clayton Act (38 Stat. L. 731, U. S. C., Title 15, section 17) and the Capper-Volstead Act (42 Stat. L. 388, U. S. C., Title 7, sections 291-292). In this connection, see likewise

Smith v. Kansas City Title & Trust Company, 255 U. S. 180, 65 L. Ed. 577, 41 Sup. Ct. 243 (1921),

wherein the Federal Farm Loan Act (39 Stat. L. 360, 40 Stat. L. 431) was held to be constitutional.

In view of this settled policy it would seem competent for Congress to direct the Commission to accord to agricultural products affected by depression "the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

B. Pertinence of the Resolution to the present proceeding.

It is contended that the Commission misapplied the Resolution in this case, since this was not a general investigation of the entire rate structure of the country. The argument is that the Resolution cannot be invoked in a proceeding involving a single rate or a class of rates, but is pertinent only to a general investigation of the rate structure of the entire country instituted by the Commission pursuant to the Resolution, wherein the Commission shall make simultaneous and reciprocal increases and decreases in rates.

There is nothing in the Resolution which prohibits the Commission from observing this rate-making policy in cases involving a single rate or a class of rates. And we are not required to rest upon the want of such prohibition, since the Resolution by its very terms indicates that application of that rate-making policy to the movement of products of agriculture shall not await the outcome of the vast investigation contemplated by the second paragraph of the Resolution. The text shows that it contemplates expeditious action. The third paragraph refers to "the existing depression in agriculture" and directs the Commission to effect the purposes of the Resolution "with the least practicable delay".

Further evidence of the desire of Congress for immediate relief for agriculture is afforded by the proviso in the concluding portion of the Resolution. This proviso recites:

> "That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the Commission involving rates on products of agriculture, and that *such cases shall be decided in accordance with this resolution.*" (Emphasis supplied.)

Certainly we cannot assume an intent on the part of Congress that the policy of the Resolution should be observed in individual rate cases pending before the Commission at the time of its passage and that it should thereafter lie dormant until the determination of the general investigation to be instituted by the Commission. The Resolution in its entirety conveys the purpose of prompt relief for branches of agriculture suffering from economic depression.

Moreover, as the United States District Court points out in its memorandum opinion of January 18, 1928, in this cause (R. 100), the terms of the Resolution "are in a large measure directory". The quoted observation follows the conclusion of the Court that the Commission had authority to reduce rates on products of agriculture before completing its general investigation of the rate structure (R. 100).

To argue that the Commission misconstrued the Resolution as authorizing it to reduce a single rate or a class of rates without a contemporaneous rearrangement of the

rate structure of the country is to contend that after the adoption of the Resolution all changes in rates upon products of agriculture affected by depression must emanate from the general rate investigation alone. The Resolution does not provide or imply that the Commission is inhibited from acting in response to formal complaint. If this construction were to be impressed upon it, the rate structure on products of agriculture would be hard frozen for many years pending the completion of the country-wide investigation inaugurated by the Commission in Docket No. 17,000 (R. 518). The Resolution would have become a means to frustrate all efforts to secure needed rate relief for agriculture. *The Resolution would thus have so functioned as to safeguard the carriers for many years against rate reduction on products of agriculture*—a complete negation of the Congressional intent.

It is recognized in the brief of appellants that the Resolution contemplates "first aid" for agriculture. The following sentence is quoted from appellants' brief (page 70):

> "* * * It directed the Commission, as the agents of the government, to revise the rate structure in accordance with existing law, to do away with the inequalities and injustices that had grown up by reason of its unscientific piecemeal growth, and *to give first aid and attention to agriculture* in its work of revision." (Emphasis supplied.)

The suggestion that *first* aid is to be given to agriculture is not consistent with the contention that reductions

in rates on agricultural products shall await the outcome of the general investigation or that reductions and advances must be concurrent and reciprocal.

If examination of the terms of the Resolution leaves doubt as to its interpretation, the Court may determine the legislative intent from an examination of the legislative history, including the changes made in the Resolution in the course of its passage, the reports of committees of Congress to which the Resolution was referred, and explanatory remarks of the committee member in charge of the Resolution.

Binns v. United States, 194 U. S. 486, 48 L. ed. 1087, 24 Sup. Ct. 816 (1904);

Johnson v. Southern Pacific Company, 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. 158 (1904);

Lewis Publishing Company v. Morgan, 229 U. S. 288, 57 L. ed. 1190, 33 Sup. Ct. 867 (1913);

United States v. Forty Barrels Coca Cola, 241 U. S. 265, 60 L. ed. 995, 36 Sup. Ct. 573 (1916);

Caminetti v. United States, 242 U. S. 470, 61 L. ed. 442, 37 Sup. Ct. 192 (1917);

United States v. St. Paul, Minneapolis & Manitoba Railway Company, 247 U. S. 310, 62 L. ed. 1130, 38 Sup. Ct. 525 (1918);

Duplex Printing Press Company v. Deering, 254 U. S. 443, 65 L. ed. 349, 41 Sup. Ct. 172 (1921).

As finally passed, the Hoch-Smith Resolution is a consolidation of two distinct resolutions, introduced in the House of Representatives and the Senate, respectively. The second paragraph of the Resolution as finally adopted

had its origin in House Joint Resolution 141 (68th Congress, 1st Session), introduced before the House of Representatives by Mr. Homer Hoch of Kansas on January 16, 1924 (Cong. Rec., Vol. 65, p. 1071). That resolution contemplated a general investigation of the entire rate structure of the country, *for the purpose of eliminating the inequalities in freight rates which had resulted from the horizontal rate increases and decreases during and after the war.* (See House Report No. 735, House Reports, Vol. IV, 68th Cong., 1st Sess.)

Except for minor changes, the first and third paragraphs of the Resolution as finally adopted formed the whole of Senate Joint Resolution 107 (68th Congress, 1st Session) as originally passed by the Senate on May 12, 1924 (Cong. Rec., Vol. 65, pp. 8336-8337). That resolution contained no reference whatsoever to an investigation of the rate structure of the country. It declared the rate-making policy contained in the first paragraph of the Resolution as finally passed, and continued (Cong. Rec., Vol. 65, p. 8336):

> "It is further declared that agriculture is the basic industry of this country; and that it is the policy of Congress to promote, encourage, and foster that industry, and especially in rate making during the existing depression in agriculture. *In furtherance of these policies* the Interstate Commerce Commission is hereby directed, *with the least practicable delay,* to effect such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service. * * *" (Emphasis supplied.)

There is not the slightest suggestion that this original Senate resolution contemplated an investigation such as is directed by the second paragraph of the Resolution as finally adopted. The policy announced was, of course, intended to be applied in all proceedings. Immediate relief for products of agriculture was contemplated. The report of the Senate Committee on Interstate Commerce supports this view. In recommending that Senate Joint Resolution 107 pass, the Committee states (Senate Report No. 313, Senate Reports, Vol. I, 68th Cong., 1st Sess.):

> "This joint resolution is for the purpose of declaring the policy of the Congress as to freight rates on agricultural products and directing the Interstate Commerce Commission to carry this policy into effect.
>
> Congress having delegated to the Interstate Commerce Commission the power to make rates, it was thought unwise to attempt to dictate any specific rate, but to direct the commission that *in the exercise of its rate-making power* that the products of agriculture should carry the lowest rate in the rate structure. * * *" (Emphasis supplied.)

It will be noted that no suggestion is found in the Committee's report that this policy shall be applied only in an investigation of the entire rate structure of the country. It indicates clearly that the policy shall be followed whenever the Commission is called upon to exercise its rate-making power. Since the contents of this resolution have, in substance, been carried into final form as the first and third paragraphs, there is no possibility of reading into the Resolution in its entirety a provision limiting application of the rate-making policy to a general investigation of the entire rate structure of the country.

Senate Joint Resolution 107, as passed by the Senate, was amended in the House by consolidating all of House Joint Resolution 141 and the second paragraph of Senate Joint Resolution 107. (House Report No. 867, House Reports, Vol. IV, 68th Cong., 1st Sess.; Cong. Rec., Vol. 65, pp. 9675, 11018-11026.) The House Committee on Interstate and Foreign Commerce, in reporting this amendment, incorporated into one resolution the requirement of a general investigation as contemplated by House Joint Resolution 141 and the Senate's plan of prescribing a rate-making policy. The report of the Committee indicates that the two paragraphs of the proposed consolidated resolution contemplate entirely different courses of action by the Commission and that the observance of the policy declared in the last paragraph is not confined to the investigation directed by the other paragraph. Referring to the last paragraph, the report says (House Report No. 867,* *supra*):

> "* * * This direction to the commission involves no purpose to do injury to the carriers but expresses the will of Congress that in this time of agricultural depression the basic industry of agriculture shall be given *with the very least possible delay every consideration in the matter of rates consistent with the*

*In the discussion of the legislative history of the Hoch-Smith Resolution in the brief of appellants, House Report No. 735 is quoted. (Brief of appellants, pages 56-58.) It is erroneously stated by the appellants (brief, page 56) that this report was rendered at the time of the consolidation of House Joint Resolution No. 141 and Senate Joint Resolution No. 107. This is in fact the report on the original House Joint Resolution No. 141. That resolution contemplated only a general investigation. Consequently, House Report No. 735 relates only to the desirability of a general investigation. House Report No. 867 is the report upon the consolidated resolution. The difference in the language of these two reports discloses the dual scope of the resolution after the consolidation of House Joint Resolution No. 141 and Senate Joint Resolution No. 107.

maintenance of adequate transportation service." (Emphasis supplied.)

Mr. Hoch, the committee member in charge of the resolution in the House, gave the following explanation of the second paragraph as reported by the Committee—the third paragraph of the resolution as finally adopted (Cong. Rec., Vol. 65, p. 11024):

> "* * * The second paragraph is an honest direction to the commission, calling attention to the agricultural depression and *directing every possible relief, reasonable and lawful, at the earliest practicable date.* * * *" (Emphasis supplied.)

Senate Joint Resolution 107, amended as indicated above, was passed by the House. (Cong. Rec., Vol. 65, p. 11026.) The Senate disagreed to these amendments. (Cong. Rec., Vol. 65, p. 11124.) A conference between members of the Senate and the House resulted in a conference report which added to the Resolution, as passed by the House, the first paragraph as finally adopted and changed slightly the third paragraph. (Cong. Rec., Vol. 65, pp. 11245-11246.) The Resolution was passed by both the Senate and the House in accordance with the conference report. (Cong. Rec., Vol. 65, p. 11246; Vol. 66, p. 2501.) It became effective on January 30, 1925.

Analysis of both the terms of the Resolution and the proceedings in Congress leads irresistibly to the conclusion that the Hoch-Smith Resolution represents a direction by Congress to the Commission to afford agricultural products affected by depression immediate rate relief in all respects which are legally possible. The pres-

ent case offers an instance in which it is legally possibl for the Commission to afford such relief. It is precisel one of the cases toward which the Resolution is directe Certainly there is nothing in the text of the Resolutio itself or in the proceedings before Congress which su ports the contention that the purpose of the Resolution limited to an investigation of the entire rate structure the country.

C. Standards of Reasonableness Required by Hoch-Smith Resolution.

The claim is made that the Commission's order is arb trary and beyond its power because, it is asserted, th Commission failed to find that the rates which it ordere reduced were unreasonable and that the rates prescribe were reasonable, as tested by the accepted principles rate-making. It is likewise contended that the Commissio construed the Hoch-Smith Resolution as authorizing an directing it to reduce reasonable rates on agricultur products affected by depression, and to establish suc rates below the point of reasonableness. We propose t show that the Commission has neither so acted nor s ruled.

1. *Commission's construction of Resolution in relatio to determination of reasonableness of existing rates.*

The Commission recognized that the existing rates mu be proved unreasonable in accordance with accepted pri ciples of rate-making before it could proceed to acco products of agriculture affected by depression the lowe possible lawful rates compatible with the maintenance adequate transportation service. Furthermore, it e

pressly found the existing rates unreasonable upon the record.

The appellants suggest that there is no warrant "for the Commission to reduce an admittedly reasonable rate." (Brief of appellants, page 75.) The Commission has nowhere said or implied that the rates assailed are "admittedly reasonable." This term is of the appellants' coinage.

In its report the Commission states (R. 26) that defendants "claim that if they have justified their present rates under sections 1 and 3 of the interstate commerce act, nothing either in the Hoch-Smith resolution, or developed of record in the instant case, will provide lawful warrant for us to reduce such rates". The Commission indicates its concurrence in defendants' position by quoting the following from one of its prior decisions construing the Resolution (R. 26):

> "* * * *It sets no new standard of lawfulness,* but provides, in effect, that to the extent that there are flexible limits to our discretion, we shall require the maintenance of the lowest rates falling within those flexible limits. * * *" (Emphasis supplied.)

It has previously been pointed out that the Commission treated this case as a conventional rate case and that it devoted page after page of its report (R. 28-48) to testing the current rates by the accepted principles of ratemaking.

Not only do the contents of the report show that the Commission tested the reasonableness of the existing rates in the ordinary manner, but in both the original report

and the report on further consideration there are express findings of unreasonableness. At the close of the original report, the Commission finds (R. 58):

> "that the rate of $1.73 as applied to the transcontinental shipment of deciduous fruits from California to Groups A to M inclusive, except Group J is, and for the future will be, unreasonable to the extent that it exceeds or will exceed $1.60; * * *."

There is an analogous finding with respect to the rate of $1.62 to Group J. Again, in the report on further consideration, the Commission states (R. 68):

> *"On the whole record, we adhere to our former finding that the present rates are unreasonable* * * *." (Emphasis supplied.)

These findings must be read in conjunction with the Commission's entire report.

> *Southern Pacific Company v. Interstate Commerce Commission,* 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. 288 (1911).

When so read, they indicate clearly that the Commission is referring to the unreasonableness of the rates in accordance with the standard tests of reasonableness, the application of which has consumed so many pages of its report. (R. 28-48.)

We agree with appellants that an expression of the Commission cannot acquire a meaning never intended "by being lifted out of its context and segregated from the remainder of the report". (Brief of appellants, p. 49.) We are likewise in agreement with the suggestion that "The whole report may be examined to determine

the real grounds on which the Commission's order is based and its nature and character". (Brief of appellants, p. 49.) It seems to us, however, that the appellants' presentation involves a signal violation of these rules. In brief, reliance has been placed upon language which has been "lifted out of its context" and various expressions have been assembled in such fashion as to induce a meaning which the entire report does not convey. (See brief of appellants, pp. 41-48.)

The appellants refer to the Commission's statement (R. 58) that "the present rates are in excess of the lowest possible lawful rates as herein defined". (Brief of appellants, p. 44.) This language affords no indication that the Commission failed to test the existing rates by the ordinary standards of reasonableness. This particular finding should be construed in association with other findings, and we may recall again that the Commission devotes many pages of its report to testing the existing rates in accordance with conventional methods.

Appellants likewise seek to find support for their position in the Commission's statement (R. 56) that "The primary issue to be determined, therefore, is whether the $1.73 rate assailed approaches the lowest limit or level of the zone of reasonableness permitted by the flexible limit of discretion reposed in us". (Brief of appellants, pp. 42, 43, 47 and 48.) Here again the import of this statement cannot be determined if it is to be wholly dissociated from the remainder of the report. When the report in its entirety is reviewed it is found that the

Commission's statement last above quoted is addressed to the determination of the measure of future rates, responsive to the terms and purpose of the Hoch-Smith Resolution. At that stage of the inquiry, the "primary issue" was exactly as stated by the Commission.

The appellants select various statements which appear in the concurring and dissenting opinions. Of course these opinions are not controlling, but when they are read in conjunction with the opinion of the majority they lend no support to the appellants' contention that the Commission failed to consider the reasonableness of the existing rates.

2. *Commission's construction of Resolution in relation to fixing reasonable rates for future application.*

The Commission's analysis of the Hoch-Smith Resolution in its report (R. 26-28) leaves no doubt that it considers that the rates which it is authorized to establish pursuant to the Resolution must be reasonable in accordance with accepted principles of rate-making. Of the Resolution, the Commission says, quoting from an earlier decision (R. 27):

> "* * * Of course, the other sections of the interstate commerce act must also be borne in mind in determining the lowest lawful rates in a particular situation."

This is followed by a restatement of this same view in the following language (R. 27):

> "The resolution is in effect a direction to us to give agricultural commodities affected by depression

> the lowest rates that it is possible to give without running counter to the provisions of the interstate commerce act and the carriers' rights under the Constitution. Section 1 of the act requires that all rates shall be just and reasonable. What is a reasonable rate? * * *"

The Commission proceeds to answer this question. It states (R. 27-28):

> "* * * there is a zone of reasonableness within which any rate is just and reasonable to the carrier as well as just, fair, and reasonable to the shipper that utilizes the carrier's services."

The following definition of "the lowest possible lawful rates" is then given by the Commission (R. 28):

> "We again conclude that 'the lowest possible lawful rates' which we may prescribe under the resolution on any given agricultural traffic as to which depression has been shown must be somewhere within the zone of reasonableness permitted by the flexible limits of discretion reposed in us, and that such rates must be put as near the lowest limit or level of that zone as is compatible with the maintenance of adequate transportation service."

In the light of this definition, the Commission expressly finds (R. 59) that the rates prescribed "are the lowest possible lawful rates compatible with the maintenance of adequate transportation service".

We agree with appellants that "the word 'lawful' is not intended to mean something different from 'reasonable,' or to fix a different standard than would be fixed by the word 'reasonable.' " (Brief of appellants, page

75.) Our challenge is directed to the contention that the Commission has attempted any such differentiation. It will appear upon a reading of the report that, in the view of the Commission, the word "lawful" means "reasonable."

3. Validity of the Resolution as construed by the Commission.

As construed by the Commission, the Hoch-Smith Resolution does not effect the reduction of rates which could not properly be reduced by the Commission without the aid of the Resolution, nor does it bring about the reduction of rates below a point to which they might properly be reduced without the aid of the Resolution. Unreasonable rates have been ordered reduced and reasonable rates have been prescribed. The standard of reasonableness which has been applied is entirely apart from the terms of the Resolution.

Consequently, it cannot be said that section 1 of the Interstate Commerce Act has been violated, or that the carriers have, in disregard of any statutory or constitutional provision, been prevented from maintaining rates which they are entitled to maintain or compelled to establish rates which are lower than they can properly be required to establish.

The Commission's order in this case does not present the difficulties which led this Court to annul the Commission's order in

United States v. New York Central Railroad Company, 263 U. S. 603, 68 L. ed. 470, 44 Sup. Ct. 212 (1924).

That case arose out of an order of the Interstate Commerce Commission which purported to be made pursuant to an amendment to section 22 of the Interstate Commerce Act. This amendment, among other things, directed the Commission to require each carrier by rail subject to the Act to issue interchangeable mileage or scrip coupon tickets at just and reasonable rates. After a hearing the Commission ordered all Class I railroads to issue a non-transferable interchangeable scrip coupon ticket in the denomination of $90, which should be sold at a reduction of 20 per cent from the face value of the ticket. The carriers secured a permanent injunction from the United States District Court against the enforcement of the Commission's order. This was affirmed by the Supreme Court on appeal. This Court held that the amendment to section 22 of the Interstate Commerce Act

> "required a determination of what was just and reasonable exactly as in any other case arising under the Interstate Commerce Act." (Page 610.)

The Court was of the opinion that the Commission's order was made solely in deference to the amendment and that the Commission had reached a result which otherwise would not have been reached.

The Commission's order which the Court annulled was entered in

> *Interchangeable Mileage Ticket Investigation*, 77 I. C. C. 200 (1923).

An examination of the Commission's report in that proceeding shows that the Commission did not test the reasonableness of the existing fares by any standard. The

notice of hearing issued by the Commission instituting the proceeding contained nine suggested lines of evidence. There is no suggestion of any evidence concerning the reasonableness of the existing fares nor of evidence testing by accepted principles of rate-making the reasonableness of the fares prescribed. The entire structure of the Commission's report shows that the Commission did not treat the case as a conventional rate case, but that it assumed to prescribe reduced fares regardless of whether the existing fares were unreasonable or whether those prescribed would be reasonable.

A comparison of the report in that case with the Commission's report in the present case will reveal the lack of similarity between the two proceedings. The report in the present case is full of indicia that the Commission avoided the errors which the Court found in the *Passenger Scrip* case.

D. Consideration of Economic Condition of the Deciduous Fruit Industry.

It is apparent from a reading of the Commission's report that the Commission has not reduced rates in this proceeding solely in response to the economic condition of the deciduous fruit industry in California. It is true that, having found the existing rates unreasonable in accordance with accepted principles of rate-making, the Commission followed the rate-making policy declared in the Hoch-Smith Resolution and considered the economic condition of the industry in determining at what point within the zone of reasonableness the new rates should be established.

This is but the correlation of the charge for the service rendered by the carrier to the value of the service to the shipper. It is the application of the well-established principle of "charging what the traffic will bear". We have pointed out in an earlier portion of our argument that this principle was followed by the Commission and approved by this Court long before the passage of the Hoch-Smith Resolution.

Appellants rely upon decisions which hold, in brief, that rates may not be reduced solely because of the unfavorable economic state of a particular industrial enterprise.

In

Southern Pacific Company v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. 288 (1911),

suit was brought to enjoin the enforcement of an order of the Commission setting aside increased rates on lumber from points in the Willamette Valley, in Oregon, to San Francisco Bay points and restoring, substantially, rates which had previously been in effect. It clearly appeared, upon a review of the Commission's opinion, that the advanced rates were not condemned as unreasonable. In fact, the reasonableness of the advance was admitted by the complaining lumber interests, but it was insisted that because the lower rates had long been voluntarily maintained, the carrier was estopped from making an increase. The Commission upheld the contentions of the complaining lumber interests and condemned the advanced rate. The Supreme Court annulled the Commission's order because it did not proceed from an exercise of the power

to make reasonable rates, but was rested, rather, upon an assumed equitable estoppel.

Another case of apparently similar character is

Anchor Coal Company v. United States, 25 F. (2d) 462 (D. C. W. Va. 1928).

This was a suit in the United States District Court for the Southern District of West Virginia to enjoin the enforcement of an order of the Interstate Commerce Commission which directed that the carriers cancel certain rate schedules reducing by 20 cents per ton the freight rate on "lake cargo" coal from the southern coal field to the lake ports. The Commission had previously issued an order reducing by 20 cents the rate from the northern field to the lake ports, thus increasing from 25 to 45 cents the differential in favor of the northern field. Subsequently, the carriers serving the southern field filed schedules reducing the rates from the southern field by 20 cents, thereby restoring the old differential. These rates were suspended by the Commission. After a hearing, the Commission ordered the new schedules cancelled. (139 I. C. C. 371.) Suit was brought to enjoin the Commission's order. The District Court granted the injunction, and an appeal is now pending in this Court.

One ground of the Court's decision was that the Commission's order was based upon the relative industrial conditions prevailing in the northern and southern coal fields. The Court concluded that both the Commission's order reducing the rate from the northern field and its order cancelling the proposed reductions from the southern field were based, not upon accepted principles of rate-

making, but solely upon industrial conditions. In other words, the Court concluded (page 471) that this was purely an effort on the part of the Commission "to equalize industrial conditions or offset economic advantages through adjustment of rates". The Court indicates that its ruling was rested upon the same ground which determined the Supreme Court's decision in *Southern Pacific Company v. Interstate Commerce Commission, supra.* Respecting that case the District Court says (page 472):

> "* * * but in that case, as we think in this, the report of the Commission showed that its action was based primarily upon a consideration of the effect of the rate on industry. * * *"

Further language of the Court in the *Anchor Coal Company* case shows clearly that, in the Court's opinion, the Commission was not endeavoring to regulate rates, but was attempting to establish rates which would enable producers located at different points to compete in the same market. The Court says (page 470):

> "It is perfectly evident from a study of the foregoing reports of the Commission that, in reducing the rates from the northern field, and in directing the cancellation of the reduction from the southern field, the Commission was primarily concerned, not in fixing rates, but in fixing the differential which was to prevail between the two fields, and that, in expanding the differential to 45 cents and in refusing to allow the old differential of 25 cents to be restored, the Commission based its action upon the shift of tonnage from the northern to the southern field and the industrial conditions resulting therefrom. * * * But it must be manifest that increasing the differential to meet such a situation is not regulation of rates, but regulation of industrial conditions under

> the guise of regulating rates. * * * It matters not what this may be called, it is in essence a regulation of industrial conditions through manipulation of rates."

An effort was made to justify the Commission's action in that case under the terms of the Hoch-Smith Resolution. The District Court held that the Hoch-Smith Resolution did not give the Commission power to regulate industrial conditions under the guise of rate-making.

The appellants refer to other cases which hold that the Commission cannot regulate industry under the guise of rate-making and that it cannot "equalize fortune, opportunities or abilities". (Brief of appellants, pages 120-128.) It is unnecessary to discuss these decisions in detail. They are wholly inapposite here. The Commission has not required a rate reduction in the instant case solely because of the serious and persistent depression in the California deciduous fruit industry. It has found that these conditions exist, but has accorded them weight only for the purpose of assisting it in the exercise of its lawful rate-making discretion. The Commission has not regulated industrial conditions under the guise of rate-making. It has not attempted to "equalize fortune, opportunities or abilities".

The appellants likewise endeavor to show that the construction placed upon the Hoch-Smith Resolution by the Commission violates the Fifth Amendment to the Constitution. (Brief of Appellants, pages 130-147.) It is asserted that the Commission has assumed to subsidize the deciduous fruit industry. Decisions are cited which

hold that the taxing power may be exercised only for public purposes and that Congress is unable to pay a bounty to sugar producers in lieu of tariff protection. It is difficult to see how such decisions import unconstitutionality to a resolution which results in the condemnation of unreasonable rates and the establishment of reasonable rates in accordance with principles which have been universally followed in rate proceedings and approved by the Supreme Court. (*Interstate Commerce Commission v. Union Pacific Railroad Company, supra.*) The intimation that the Commission has attempted to subsidize the California deciduous fruit industry is wholly gratuitous.

The Hoch-Smith Resolution has not been construed by the Commission as a regulation of agriculture. The appellants' argument on pages 130 to 147 of their brief is based upon a distortion of the Commission's interpretation of the Resolution. The cases cited are directed to no issue raised by the attack upon the Commission's order.

In the *Anchor Coal Company* case, *supra,* the Court indicates that if the Commission had properly pursued the rate-making policy declared in the Hoch-Smith Resolution, its action would not have been objectionable. The Court says (page 474):

> "So far as the general language of the resolution is concerned, to the effect that the conditions which prevail in industry should be considered in adjusting freight rates, to the end that commodities may freely move, *this is no more than a general declaration that freight rates shall be adjusted in such way as to provide the country with an adequate system of trans-*

> *portation*, and Congress certainly did not intend by this language to create in the Commission an economic dictatorship over the various sections of the country, with power to kill or make alive. * * *" (Emphasis supplied.)

Thus, the Court voices its approval of the application, in a proceeding involving a single rate or a class of rates, of the rate-making policy declared in the Hoch-Smith Resolution, provided the action of the Commission does not go beyond rate regulation and become instead the regulation of industrial conditions.

It would be strange indeed if the Commission could not inquire into the needs of industry and the condition of the carriers with a view to exercising its rate-making discretion, provided that it undertakes to determine the measure of reasonable rates in accordance with rate-making standards. If it has rate-making discretion—if there is a zone of reasonableness within which it may exert its authority—it must familiarize itself with the economic side before it can exercise its discretion with intelligence. That such inquiries are within the proper province of the Commission is attested by the decision of the Supreme Court of the United States in *Interstate Commerce Commission v. Union Pacific Railroad Company, supra.*

We think that this decision will effectively dispose of the contention here urged that the Commission's order is invalid because it gave consideration to the economic state of the California deciduous fruit industry. The Commission properly considered and reported the facts, but only

to aid it in the exercise of its rate-making discretion. In proper course it directed itself to the determination of the measure of reasonable rates, and in prescribing these specific rates it gave appropriate weight to all the material elements of a comprehensive record bearing upon the measure of transportation charges.

E. Margin of Profit Required in Fixing Rates on Commodities within Terms of Hoch-Smith Resolution.

It is urged that the Commission misconstrued the Hoch-Smith Resolution by interpreting it as requiring, in cases of depression, the fixing of rates at a figure only slightly in excess of cost. The Commission has not so held.

In its report on further consideration, the Commission says (R. 67):

> "* * * In other words, *even if the cost study were accepted without question*, it would indicate that the prescribed rates are slightly above the operating expenses and would confirm the impression obtained from comparisons with other rates that the new rates, while probably of less than average profitableness, would still leave the traffic attractive to the carriers." (Emphasis supplied.)

The Commission's original report and the report on further consideration show that the Commission *did not accept the carriers' cost study.* (R. 67.) Consequently, it may not correctly be said that the Commission interpreted the Hoch-Smith Resolution as requiring the fixing of rates at a figure only slightly exceeding costs.

The Commission recognizes that the Hoch-Smith Resolution establishes no new standard with respect to the margin of profit to which the carriers are entitled. The

Commission accepts (R. 26) the rules announced by the Supreme Court in

Northern Pacific Railway Company v. North Dakota, 236 U. S. 585, 59 L. ed. 735, 35 Sup. Ct. 429 (1915);

Norfolk & Western Railway Company v. Conley, 236 U. S. 605, 59 L. ed. 745, 35 Sup. Ct. 437 (1915).

It recognizes that the rates which it may establish pursuant to the resolution must yield to the carriers the return which the Court required in those cases. It proceeds to fix the rates upon that basis. As we shall show in a later portion of this argument, the rates prescribed by the Commission afford the carriers a substantial return over and above the costs properly assignable to the transportation of these commodities.

Of course, the carriers cannot properly claim the same percentage of profit on every sort of traffic. This is made clear by the Supreme Court in the two cases cited immediately above. In the former the Court said (pages 598-599):

> "The legislature undoubtedly has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities, *or to secure the same percentage of profit on every sort of business.* * * *"
>
> (Emphasis supplied.)

In the *Conley* case the Court said (page 608):

> "* * * it is not necessary that there should be the same percentage of profit on every sort of business; * * *"

The same thought is expressed in

Atchison, Topeka & Santa Fe Railway Company v. United States, 203 Fed. 56 (Com. Ct. 1913),

wherein it is said (page 59):

> "* * * The carrier cannot complain of a violation of its constitutional rights if, not to favor some person or class, but for the general welfare, it is compelled to make a rate for some particular service which, though in excess of the out-of-pocket expense, would nevertheless be confiscatory if it were applied to all of its freight; that is, the carrier has no constitutional right to a rate for each distinct kind of service which will equal its proportionate share of the entire operating expenses. * * *"

That case was affirmed by the Supreme Court in a memorandum decision reported in 231 U. S. 736.

To the same effect is

Minneapolis & St. Louis Railroad Company v. Minnesota, 186 U. S. 257, 267, 46 L. ed. 1151, 22 Sup. Ct. 900 (1902).

At the very foundation of American railroad rate-making lies the principle that certain commodities must be carried at a small margin of profit while other commodities which can better afford it shall be transported at a relatively large profit to the carriers. The fact that in this proceeding the Commission may have placed the rates in the former class does not condemn its action.

F. Interpretation of "Freedom of Movement".

Appellants urge that the Commission has erroneously construed "freedom of movement", as used in the Hoch-Smith Resolution, to mean movement at a profit to the

shippers, regardless of the number of cars moving. It is argued that freedom of movement exists and that the Commission is wrong in concluding that this modest rate reduction is necessary to insure freedom of movement.

The record contains no finding by the Commission that freedom of movement does not exist unless the shipper is marketing his product at a profit. In fact, there was no such contention upon the part of the complainant.

It is true that the volume of the shipments has rapidly increased from 1917 to 1926. This increase is due to economic causes which are entirely dissociated from the rates involved in this case. The complainant before the Commission contended that increase in volume does not imply freedom of movement. These contentions are reflected in the Commission's report (R. 48), although the Commission has not in terms sustained them. The complainant has said that if these rates are so burdensome that the growers are continually in economic straits, and are harvesting and marketing their crops because they have no alternative, it is unreasonable to conclude that there is freedom of movement. In 1926 there was a definite check in the movement, and a drop of 8,000 carloads. (R. 48, 187, 223.) The evidence shows without contradiction—from official sources—that thousands of tons of grapes went unharvested in 1925, and again in 1926. (R. 48, 169, 190, 193, 378, 384.)

It is for the Commission to determine, as an experienced and expert tribunal, whether freedom of movement exists under the rates in effect. It had a sufficient record to justify the finding which it made.

6. Consideration of Section 15a of the Interstate Commerce Act.

It is contended that the Commission misconstrued the Hoch-Smith Resolution in that it failed to take into consideration section 15a of the Interstate Commerce Act.

The report expressly shows that the Commission did consider this section of the Act and that it quite properly concluded that nothing contained therein operated to prevent a reduction in these rates. The report summarizes the carriers' showing as to the rates of return on their property investments. (R. 51-53.) In turn, the Commission finds (R. 56):

> "* * * While all the defendants who handle the bulk of the deciduous-fruit traffic have not as yet made the fair return, their present financial condition is relatively strong. It seems clear that the reduction requested, if granted, would not affect the maintenance of adequate transportation service. * * *"

Section 15a expresses an objective. The Commission is not required to bring about in a year, or in any specified period, the net earnings contemplated by the statute. That would have been impossible. It was attempted by the great rate upheaval in 1920. The purpose failed, and admittedly because the rates as to many commodities were so high as to stifle the traffic. The carriers did not contend in the 1922 proceeding *(Reduced Rates, 1922,* 68 I. C. C. 676) that further advances should be made, even though the earnings were far below the returns contemplated by the statute.

Rate adjustments, even rate reductions, are not necessarily prejudicial to the carriers' revenue, both gross and

net. And it is no answer to the decision of the Commission here that the carriers of the western group may not yet have reached the full measure of earning power which the Commission is endeavoring to bring about. There has been vast improvement. The net earnings have risen from year to year, with slight checks now and then. The earnings of the year 1926 were far in excess of the earnings of 1922. (Exhibit No. 204, R. 458.)

This fact further should be noted, that the carriers made their showing on their book values. (R. 53, 461.) The Commission has never accepted the book values of the carriers as the criterion of real values. In the 1920 case it tentatively accepted the book values, less 10 per cent.

Increased Rates, 1920, (Ex Parte 74), 58 I. C. C. 220.

Section 15a of the Interstate Commerce Act was not intended to freeze all freight rates until such time as the carriers should be earning a fair return upon the aggregate value of their railway property. That section does not prevent the Commission from reducing particular rates which it finds unreasonable, although the carrier is not yet earning the fair return contemplated. Neither is the Commission compelled to give the carriers a certain return from a particular rate. These facts are made clear by the terms of section 15a itself and by the ruling of this Court.

The following proviso is found in paragraph (2) of section 15a of the Interstate Commerce Act—the very paragraph which announces the principle that rates shall be

so adjusted that the carriers will earn a fair return upon the aggregate value of their railway property:

> "*Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

Paragraph (17) of section 15a reflects the same intention.

In the case of

> *Dayton-Goose Creek Railway Company v. United States*, 263 U. S. 456, 68 L. ed. 388, 44 Sup. Ct. 169 (1924),

this Court said, in passing upon the constitutionality of section 15a (page 480):

> "• • • The statute does not require that the net return from all the rates shall affect the reasonableness of a particular rate or a class of rates. In such an inquiry, the Commission may have a regard to the service done, its intrinsic cost, or a comparison of it with other rates, and need not consider the total net return at all. Paragraph 17 of section 15a makes this clear."

Section 15a affords no valid ground for attack upon the present order of the Commission.

• • • • • • • •

Our discussion of the Hoch-Smith Resolution has been prolonged in order adequately to meet the several points urged by appellants in their effort to discredit the Commission's action and to destroy the Resolution.

We think it has been shown that the Resolution was properly construed by the Commission and that, as so construed, it violates no right of appellants under the laws or Constitution of the United States.

IV.

VALIDITY OF PRESCRIBED RATES.

The rates prescribed by the Commission for future application to the California deciduous fruit traffic have not been shown to be confiscatory.

The bill charges confiscation. We assume that this issue will be of more interest to the Court than any other. We propose to show that the carriers have not made their claim good.

Appellants' brief refers to "a cost study" which the carriers presented in evidence before the Commission. This reference to "a cost study" may lead to the inference that but a single cost study was offered. In point of fact, the carriers presented three separate cost studies. The record seems to indicates that it was the initial intention of the carriers to found this part of their case upon the two cost studies which have not even been grazed by appellants in their brief. Their reliance is now placed upon the third study only. We propose to review all three.

a. Inconsistencies between cost studies.

In the first of the cost studies which we shall consider, the so-called Wettling exhibit, (Defendants' Exhibit No.

179, R. 440-442), the statistician for the Western Lines developed a cost of $493.69 per car for the fruit movement from California to Chicago. In the so-called Conrad cost study (Defendants' Exhibit No. 252, R. 482-483), upon which appellants now rely, the indicated cost is $341.23.* The former exceeds the latter by some 45 per cent, a disparity of some moment. Furthermore, in the same Wettling cost study, the cost of moving fruit from Chicago to New York was set up as $230.79. A cost study offered by the Erie Railroad Company (Defendants' Exhibit No. 157, R. 386-397) developed a cost of $152.22 for the same service. The former exceeds the latter by 50 per cent—again a disparity of moment. These inconsistencies reveal the infirmities which are characteristic of cost studies of this type.

b. The Wettling cost study.

In Exhibit No. 179 the statistician for the Western Lines selected eight railway systems in the western district and four in the eastern district. In each instance he aggregated all of the freight transportation and maintenance costs of all of the systems. It will be noted immediately that all manner of traffic is included—main line, branch line, carload, less than carload, long haul, short haul, all commodities. (R. 443.) The total of these expenses was divided by the aggregate gross ton mileage

*Defendants' Exhibit No. 252 (R. 483) shows the cost per car as $350.23. At the hearing before the Commission counsel for the carriers stated that this figure improperly included $5.00 which represented the cost of repairs to refrigeration devices. (R. 483.) In their brief before the Commission the carriers indicated that $4.00 should likewise be deducted for supervision in connection with refrigeration. These items are not properly chargeable against the freight revenue. Consequently, the cost shown by Exhibit No. 252, as corrected by the carriers, is $341.23. The Commission so treated it. (R. 23.)

of the particular systems. The result was nothing other than the mean or average unit cost of handling all manner of freight on these systems. The derived unit was multiplied by the number of gross tons represented in a carload of deciduous fruit from California to Chicago, and in turn by the mileage. The result was set up as the cost of moving a carload of fruit. The same process was followed in the eastern district.

If such a unit cost were accepted, it would indicate that practically the entire movement of freight from California to the East is performed at a loss. Of course, such a conclusion would be palpably absurd.

We have stated that this compilation included all manner of traffic. It is notorious that the cost of handling less than carload traffic is many times as great per unit as the cost of handling carload traffic. The cost of branch line service is many times greater than the cost of main line service. Long haul operation is much more economical than short haul operation. The cost of handling different commodities varies. Costs vary inversely with the traffic density and are influenced by numerous other conditions.

Complacently ignoring these differentiating factors, the statistician proceeded to apply the mean or average unit cost against this deciduous fruit traffic, representing one of the longest hauls in the United States*, moving

*The weighted average haul of all California deciduous fruit is 2,970 miles (Defendants' Exhibit No. 166; Commission's Report, R. 20), whereas the average haul of all freight on all railroads in the United States is 325 miles (R. 443).

essentially in trainload lots, over main lines of railway, during the period of greatest traffic density and most favorable operating conditions. (See the Commission's report, R. 19-21.) The result thus obtained was tendered as the cost of the service. That the figures constitute a gross exaggeration of the actual cost will hardly require demonstration.

The Supreme Court has pointedly disapproved cost studies prepared in this fashion, because they assume that all branches of traffic and classes of service are handled at the same unit of expense. In

> *Northern Pacific Railway Company v. Department of Public Works of Washington*, 268 U. S. 39, 69 L. ed. 836, 45 Sup. Ct. 412 (1925),

the Supreme Court condemned an effort of the Washington Department of Public Works to determine the cost of hauling logs for short distances by the application of the mean unit cost of hauling all traffic. We quote from page 44 of the opinion:

> "* * * In this unit cost figure no account is taken of the differences in unit cost dependent, among other things, upon differences in the length of haul; in the character of the commodity; in the configuration of the country; in the density of the traffic; in the daily loaded car movement; in the extent of the empty car movement; in the nature of the equipment employed; in the extent to which the equipment is used; in the expenditures required for its maintenance. Main line and branch line freight, interstate and intrastate, carload and less than carload, are counted alike. The Department's error was fundamental in its nature. * * *"

These words are peculiarly pertinent here. To the same effect is the decision of the Supreme Court in

Chicago, Milwaukee & St. Paul Railway Company v. Public Utilities Commission, 274 U. S. 344, 71 L. ed. 1085, 47 Sup. Ct. 604 (1927).

c. Erie Railroad cost study (Defendants' Exhibit No. 157, R. 386-389).

The cost study of the Erie Railroad Company, Exhibit No. 157, was prepared in essentially similar fashion, except that it was confined to the line of the Erie Railroad from Chicago to New York. The witness for the Erie aggregated the freight expenses of the entire line, including the expenses of much branch line mileage, and covering all manner of traffic. Having obtained the mean or average unit cost, he applied it to the through haul here involved, viz., a solid trainload movement from Chicago to New York (R. 373). The witness admitted expressly that he had obtained merely the mean or average unit cost of handling all traffic. We quote a question and answer from his testimony (R. 398):

> "Q. So this, then, is the mean or average cost of transporting all traffic including local, interline, long haul and short haul, main line and branch line, carload and less than carload.
>
> A. Yes, sir."

Of course, an extravagent figure was obtained. The result is condemned by the same Supreme Court ruling to which we have referred.

d. Conrad Cost Study (Defendants' Exhibit No. 252, R. 482.)

The extremities of the appellants have compelled them to turn to the Conrad cost study (Defendants' Exhibit No. 252, R. 482)*. This "study" consists of a single sheet of figures, presented upon the final day of the hearing with explanatory testimony of the most casual and limited character. (R. 475-482.) It is difficult to believe that it was seriously offered, since it was not accompanied by supporting data of any character. There was no tender of working papers, neither was opportunity afforded to check the methods or details of the calculation. In commenting upon the insufficiency of the study the Commission said (R. 54):

> "No details are given in the cost study so that a check can be made as to the mechanical or clerical accuracy of the results. * * *"

The Commission's report includes a review of the cost study, and apparently a slight error was made in its analysis. This error was called to the Commission's attention and correction was made in the report upon further consideration (R. 65-69). The Commission then took occasion to point out additional defects in the cost study and refused to accept it as indicative of the actual expense of handling the traffic.

In these circumstances the carriers seek to find occasion to press for the acceptance of the cost study. The other studies are permitted to pass into the discard. We pro-

*Throughout our discussion, in view of the corrections made by the carriers and explained above, we shall consider that the purported cost reflected by Exhibit No. 252 is $341.23 per car, instead of $350.23.

pose to show that this study is permeated with fallacy, that it grossly distorts and exaggerates the cost of transportation, and that it has no claim to the confidence of the Court.

Preliminarily, it should be understood that *the appellants are seeking to force the acceptance of costs prevailing in the year 1923, although the record shows that in 1926 the unit costs had materially declined.* It should be noted further that *the cost study is confined to a single railroad* (The A. T. & S. F. Railway Company), the assumption being conveniently indulged that the same costs are prevalent on other lines. With equal complacency it is *assumed that the cost per mile east of Chicago is equal to the cost per mile west of Chicago.* The law permits no such easy generalization.

We shall address ourselves, first, to the specific fallacies which inhere in this cost study and shall consider finally the essential invalidity of its processes as a matter of law.

Particular Fallacies in Conrad Cost Study.

The several errors which appear to be of moment in this connection will be catalogued with such brevity as adequate treatment will permit.

(1) *Unwarranted use of 1923 costs.*

The Conrad cost study is predicated upon 1923 costs. (R. 475, 482.) The carriers are asking the Court to accept as controlling a study built upon 1923 costs, although the record in this case, including the carriers' own exhibits,

shows conclusively that 1923 costs, both unit and total, were much higher than in 1926.

We shall refer first to one of the carriers' exhibits in this record, Exhibit No. 204, (R. 458), which includes the carriers' own selection of lines. This exhibit shows that in 1923 the maintenance of equipment expenses for the entire Santa Fe system reached the high figure of $57,605,000. By 1926 these expenses had fallen to $47,424,000, a decline of more than $10,000,000. For the systems in their entirety, the total maintenance of equipment expenses in 1923 were $863,234,000, while in 1926 they were but $744,763,000, a decline of more than $118,000,000.

Still referring to the carriers' Exhibit No. 204, the total operating expenses of the Santa Fe declined by $4,300,000 from 1923 to 1926, in spite of an increase of over $20,000,000 in total operating revenues during the same period. The aggregate operating expenses of all of the systems shown on the exhibit were more than $154,000,000 lower in 1926 than in 1923, whereas total operating revenues declined by only $4,426,000 during the same period. Other exhibits offered by the carriers indicate similar results.

We pass in turn to an exhibit of the Railroad Commission of California in this case, Exhibit No. 6, (R. 198, fol. 261.) This exhibit shows that maintenance of equipment costs on the Santa Fe in 1923 amounted to $48,967,937. In 1926 they had fallen to $38,356,068, a decline of $10,611,869, or approximately 22 per cent. The operating ratio fell from 71.6 per cent in 1923 to 64.4 per cent in 1926. This evidences the decline in costs, both on the whole and by units.

It is enough to say that upon the carriers' own showing in this case they are not entitled to demand the acceptance as a criterion of costs today, or for the future, cost units derived for the year 1923, a year of relatively very much higher costs. It is quite probable that the high costs for maintenance of equipment in 1923 were due in large part to the shopmen's strike of the preceding year. But whatever the explanation may be, the year 1923 does not offer a proper criterion of existing costs. There is a decline from 1923 to 1926 of something over 20 per cent in maintenance of equipment cost. Loss and damage payments were decidedly higher in 1922 and 1923 than in subsequent years. (R. 498.) Allowance for this decline in expenses will cut a substantial sum from this set-up of costs.

(2) *Limited scope of the cost study.*

The study upon which Exhibit No. 252 is based was not comprehensive enough to render the results of the study representative of the average cost of moving a car of deciduous fruit from points in California to eastern defined territories.

First, the number of cars studied was but 521 cars (R. 476) out of 69,777 cars of California deciduous fruit which moved in 1923. (78,803 cars moved in 1926.) (R. 223.) This number is, of course, too small to reflect a fair average of costs.

Second, all of the 521 shipments covered by the study originated within a period of 20 days in the month of September, 1923. (R. 476.) The period covered by this

movement is not one which affords a mean or average of costs prevailing throughout the deciduous fruit shipping period, which commences in June and continues into December. (R. 21.)

Third, the study is confined to transportation on the transcontinental line of one carrier, The Atchison, Topeka and Santa Fe Railway Company, whereas the 69,777 cars of deciduous fruits moving in 1923 from California to eastern defined territories moved over the systems of three main originating carriers and their connections. (R. 19.) This Court has pointed out that when the cost of transportation over several lines of railroad is involved, the cost over each line must be shown specifically. The failure to show costs in this manner was one of the objections to the study condemned in

Northern Pacific Railway Company v. Department of Public Works of Washington, supra.

We quote from pages 43 and 44 of the opinion:

> "*A precise issue was the cost on each railroad of transporting logs in carload lots in western Washington*, the average haul on each system being not more than 32 miles. In using the above composite figure in the determination of this issue the Department necessarily ignored, in the first place, the differences in the average unit cost on the several systems; * * *." (Emphasis supplied.)

Fourth, the study does not relate to the cost of any operation or the movement of deciduous fruit east of Chicago. The cost of the movement east of Chicago is assumed to be the same per car-mile as the cost on the

Santa Fe west of Chicago. No evidence is offered nor is any attempt made to justify this assumption.

(3) *Arbitrary allocation of expenses not directly assignable.*

Maintenance of way expenses, overhead, general expenses and all charges not susceptible of direct assignment have been allocated to this traffic on a purely arbitrary basis in many instances in direct proportion to the gross ton mileage. (R. 476-478, 487.) *Such an allocation assumes that all indirect costs must be borne by the several branches of traffic in equal measure.*

Furthermore, the record shows that the total direct cost for fuel and trainmen's and enginemen's wages from Bakersfield, California, to Chicago, for one of the grape trains included in the study, inclusive of the empty return haul, was $3,076.26 (R. 489), or $55.92 per car, assuming a train of 55 cars.* Comparing this figure with the figures in Exhibit No. 252, *it appears that the total direct cost for fuel and trainmen's and enginemen's wages amounts to only 16.39 per cent of the purported operating expenses incurred in hauling a car of grapes from California to Chicago. In other words, expenses not directly assignable represent more than 83 per cent of the purported cost per car shown in Exhibit No. 252. The ratio of direct costs is so low as to indicate that expenses not susceptible of direct allocation have been excessively assigned to this traffic.*

*The carriers' own testimony before the Commission indicates that the average number of cars in a deciduous fruit train is probably in excess of 55 cars. (R. 205-206, 331, 373, 404.)

(4) *Weight of load not representative.*

The Conrad cost study purports to reflect the cost of hauling a car of grapes from California to Chicago. (R. 475-476, 482-483.) It will be noted from Defendants' Exhibit No. 166 (R. 412, fol. 632) that the average weight of the paying load of grapes materially exceeds that of other deciduous fruit. The former likewise exceeded the average carload weight of *all* deciduous fruit by some 500 pounds in 1926. Consequently, Exhibit No. 252 shows a cost in excess of the average cost of hauling all deciduous fruit by reason of the fact that certain indirect costs have been assigned on a gross ton mileage basis (R. 477) and fuel costs, which have been directly assigned (R. 476), vary with the weight of the load.

(5) *Excessive costs on the originating or Valley Division.*

An effort was made to determine the cost of handling these grape cars on the originating or Valley Division in California—the division which precedes the movement from Bakersfield, California, to the East. In attempting to arrive at this expense, the witness included all local freight costs on the division, deducting the cost of moving through trains, and reduced them to a unit. This unit cost was applied to the fruit movement to Bakersfield, the concentration point. (R. 479, 484.) Here, again, the costs which were so aggregated comprehend carload and less than carload freight, and commodities of every character moving for varying distances under diverse conditions. (R. 484.) For the reasons which we have previously pointed out, and which this Court has clearly stated, the cost of moving this carload freight cannot be determined

by taking the mean or average cost of moving all traffic, including less than carloads.

Northern Pacific Railway Company v. Department of Public Works of Washington, supra;
Chicago, Milwaukee & St. Paul Railway Company v. Public Utilities Commission, supra.

This is the identical objection which we have urged before. The result of using this mean or average unit cost was to produce a very much higher cost on this division than on the main lines beyond Bakersfield—35 cents per car-mile as compared with a weighted average of 13 cents per car-mile on the main line. (R. 482.)

(6) *Improper inclusion of cost of ice-haulage.*

For the movement of these trains from Bakersfield to Chicago, transportation costs were directly determined and assigned. The actual fuel costs and wages of trainmen and enginemen in connection with the movement of the trains studied were determined and set up in their entirety against this freight movement. (R. 476, 484-485.) The transportation of deciduous fruit comprehends not only the movement of the fruit but likewise the movement of the ice in the bunkers of the refrigerator cars, used for refrigeration service. There are two distinct charges in connection with the deciduous fruit traffic: first, there is the freight rate—$1.73 per 100 pounds at the time of the Commission's order; and, second, there is a refrigeration charge, a stated charge per car—e. g., $105 to New York—for refrigeration service. Aside from the cost of the ice itself, the refrigeration charge includes compensation for the following elements:

1. *Cost of hauling the ice in the bunkers of the refrigerator cars.*
2. Switching the cars to and from stations for the purpose of placing ice in the bunkers.
3. Repairs to the refrigeration devices of the cars.
4. Supervision in connection with refrigeration.

This is clearly shown by the decisions of the Interstate Commerce Commission in

Arlington Heights Fruit Exchange v. Southern Pacific Company, 20 I. C. C. 106 (1911);

Railroad Commission of California v. Alabama Great Southern Railroad Company, 32 I. C. C. 17 (1914);

Perishable Freight Investigation, 56 I. C. C. 449 (1920).

It will be recalled that the carriers expressly deducted from the cost shown by Exhibit No. 252 the expense incurred in connection with all of these items except the cost of hauling the ice in the bunkers of the refrigerator cars. The Commission allows and the carriers receive compensation for the haulage of that ice in the stated refrigeration charge. This element of cost should have been deducted along with the cost of switching to and from icing stations, repairs to refrigeration devices and supervision.* Accordingly, when the witness by this study

*Counsel for the carriers expressly stated earlier in the hearing before the Commission that costs incident to the icing service are included in the refrigeration charge and are not a matter of expense in connection with the freight service. We quote from the statement of the evidence before the Commission, at page 358 of the Record herein: "Counsel for the carriers stated that the carriers do not intend to use the icing service in justification of the freight rates on deciduous fruits, because that service is properly included in the refrigeration charge, and it is not intended to create the inference that such service is really a matter of expense on the freight service."

determines the entire transportation cost from Bakersfield to Chicago and assigns it to the freight service and charges it against the freight rate, the carriers are thereby receiving a duplicate compensation to the extent that a part of that cost is in the stated refrigeration charge.

The cost of hauling the ice is of no little moment, amounting to approximately $40 per car for the weighted average transcontinental haul of deciduous fruit. That amount should be deducted from the purported cost per car reflected by the Conrad study.

During the pre-war period the cost of ice haulage from California to Chicago was determined by the Commission to be $22.50 per car.

> *Railroad Commission of California v. Alabama Great Southern Railroad Company, supra.*

Converted to present day price levels on the basis of a 50 per cent increase in costs since the pre-war period and extended for the weighted average haul, the cost of hauling this ice is more than $40 per car.

(7) *Excessive allocation of car repairs and depreciation.*

The estimated cost of car repairs and depreciation is excessive by reason of an allocation which is wholly improper. The theory of the witness was that since refrigerator car costs are, on the average, 10 per cent above the cost of repairing other equipment, it is proper to make the charge here 10 per cent in excess of the charge on other equipment. But the allocation is made upon a car-mile basis. (R. 477.) This immediately inflates and

exaggerates the cost, because the mileage made by refrigerator cars per day is greater than the mileage made by other equipment.

(8) *Empty car haul included in excessive measure.*

In compiling Exhibit No. 252 the carriers have likewise used an excessive percentage for the empty car haul. The cost of moving the loaded cars eastbound was charged with the expense incurred in hauling 81.5 per cent of that number of cars westbound empty. (R. 478.) That figure purports to represent the proportion of the particular 521 cars included in the study which moved westbound empty on the trip immediately preceding the loaded eastbound movement which was studied. (R. 478.) The carriers' Exhibit No. 210 (R. 470-471), introduced in evidence in this proceeding by the same witness who presented this cost study, shows that the empty car ratio which was used in Exhibit No. 252 was 4 per cent higher than the corresponding ratio on the line of the Santa Fe for the whole of the same month in which the cars included in Exhibit No. 252 moved, namely September, 1923. It also appears from Exhibit No. 210 that a large portion of the deciduous fruit shipped from California to the East moves at times when the percentage of empty to total movement of refrigerator cars westbound is considerably below that used in compiling the Conrad cost study.

It is obvious that the ratio of empty to total movement of refrigerator cars westbound which should be used in a cost study purporting to show the cost of transporting deciduous fruit in the year 1923 on the Santa Fe Railway is the annual percentage of empty to total westbound

movement on that railway in 1923.* Exhibit No. 210 indicates that the latter figure is 70.34 per cent. Consequently, 70.34 per cent should have been used as the empty car ratio, instead of 81.5 per cent, in compiling this cost study.

The effect of this error on the part of the carriers is to exaggerate by over 15 per cent the cost of the empty return movement of refrigerator cars which is properly chargeable to the movement of deciduous fruit from California to the East.

In addition to using an excessive ratio in determining the cost of the empty return haul, the carriers have included in the purported cost of the empty haul items which should have been excluded. We have pointed out that Exhibit No. 252 indicates that $2.45 was deducted from the final cost per car as representing the cost of switching cars to and from icing platforms and not properly chargeable against the freight service. Similarly, counsel for the carriers stated in the proceeding before the Commission that $5 should be deducted for repairs to refrigeration devices and $4 for supervision in connection with refrigeration. It will be noted that none of these charges was deducted until after the cost of the empty return haul had been computed. Consequently, Exhibit No. 252 includes as part of the cost of the empty return haul 81.5 per cent of the total charges which are properly assignable to the refrigeration service. This, of

*The testimony of the manager of the Santa Fe Refrigerator Department before the Commission indicates that this is the proper manner in which to determine the empty car costs assignable to the deciduous fruit movement. We quote from the statement of his testimony at page 347 of the Record herein: "The empty westbound movement of refrigerator cars in December is chargeable to all the perishable traffic moving from California, including deciduous fruits."

course, applies with equal force to the cost of hauling the ice in the bunkers, which was not even deducted in the final instance. It is clear that none of these refrigeration costs is incurred when the car moves empty. The total costs assignable to refrigeration which have been included in Exhibit No. 252, representing only the haul to Chicago, amount to approximately $45.20. Consequently, the carriers' failure to deduct these costs in computing the cost of the empty return haul results in an exaggeration of $36.84 in the total expense per car shown on Exhibit No. 252. *This amounts to an error of $46.92 per car in the purported cost for the weighted average haul of 2970 miles.*

(9) *Inclusion of arbitrary percentage of cost of handling company material.*

It appears from the testimony of the witness who prepared this cost study that after all other costs included in the study had been determined, 10 per cent of that amount was added to represent the expense of handling company material. (R. 478.) It is questionable whether the percentage used is not excessive. It is certain, however, that the method adopted by the witness resulted in an exaggeration of the costs properly assignable to this traffic. We have seen that the purported cost of both the loaded and the empty hauls includes charges properly assignable to the refrigeration service. Some of these were deducted in the final instance and others were never deducted. None was deducted, however, before the cost of hauling company material was determined. Conse-

quently, the figure purporting to represent the cost of hauling company material in fact includes elements which are not chargeable against the freight service.

(10) *Improper extension of cost for weighted average haul.*

Exhibit No. 252 purports to show the cost per car for the movement from California to Chicago, a distance of 2331 miles. The carriers derive their purported cost per car for the weighted average haul of California deciduous fruit, 2970 miles, by multiplying the cost per car-mile derived in Exhibit No. 252 by 2970.

In extending the purported cost developed by Exhibit No. 252 for a haul of 2970 miles, loss and damage costs have improperly been increased. It appears from Exhibit No. 252 and the testimony of Witness Conrad (R. 478) that $7.43 represents the loss and damage cost per car, regardless of the length of the movement. Such loss and damage costs should remain at $7.43 per car even though the length of the haul is increased from 2331 miles, the distance from California to Chicago, to 2970 miles, the length of the weighted average haul.

The cost of handling these cars on the expensive originating division of the Santa Fe has likewise been improperly treated in extending the cost to a distance of 2970 miles. The cost on this division has been included in determining the cost per car-mile, whereas the originating division should have been treated separately in extending the purported cost for the total haul of 2970 miles.

Essential Invalidity of Processes Followed in Cost Study.

In the course of the preceding analysis of the methods employed in the development of the cost study we referred to the "arbitrary allocation of expenses not directly assignable". We readily grant that every considerable branch of traffic must be subject to rates which will return all of the costs which are directly assignable, a fair proportion of expenses which cannot be directly assigned, and which will also provide a reasonable contribution to profit. But the law does not require that all traffic shall contribute ratably to indirect or non-assignable expenses. If such were the requirement, rates upon all commodities would tend to uniformity, an end which, as previously shown, is impossible of attainment. The Conrad cost study presupposes that all such indirect expenses shall be allocated to the fruit traffic in direct proportion to some arbitrary formula such as relative gross ton mileage. Only by this allocation can the semblance of an unremunerative rate be shown. The decisions of the Court lend no sanction to this arbitrary scheme of allocation. The cases of

Northern Pacific Railway Company v. North Dakota, 236 U. S. 585, 59 L. ed. 735, 35 Sup. Ct. 429 (1915),

Atchison, Topeka & Santa Fe Railway Company v. United States, 203 Fed. 56 (Com. Ct. 1913), affirmed in 231 U. S. 736,

show beyond question that the carrier cannot demand as a matter of constitutional right that all traffic shall con-

tribute ratably to the indirect or nonassignable expenses. In the former case the Supreme Court said (page 597):

> "* * * This, of course, does not mean that all commodities are to be treated as carried at the same rate of expense. The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. * * *"

In the latter case it is said (page 59):

> "* * * the carrier has no constitutional right to a rate for each distinct kind of service which will equal its proportionate share of the entire operating expenses. * * *"

Certainly, in view of these declarations by the Courts, proof is required to support the allocation adopted by the carriers. No such proof was offered. It must be apparent that the method pursued by the carriers charges against the deciduous fruit traffic an undue proportion of these indirect expenses and includes many items of expense which are in no way related to that traffic.

The contention has not and manifestly cannot be made that the rates prescribed by the Commission for the deciduous fruit movement are insufficient to yield the direct cost of the service, a fair proportion of indirect costs, and a reasonable margin for profit.

The fallacies of the Conrad cost study which we have pointed out should suffice to show that it cannot possibly support the claim of confiscation. When the errors which

we have indicated are corrected, the study will show, not that this traffic is carried without compensation, but that it is in fact, more highly profitable than the Commission itself realized.*

The appellants state that "The carriers' cost study was the only direct and persuasive evidence as to costs and afforded the best possible evidence and in fact the only substantial evidence as to what was a lawful rate." (Brief of appellants, page 183.) The implication is that the Commission was required to accept the purported costs shown by the Conrad study because that afforded the most specific evidence as to costs. The futility of this argument is apparent when it is realized that it would require the Commission to accept as valid the Wettling and Erie Railroad cost studies if the Conrad exhibit had not been offered. The weight to be accorded the evidence is a matter for the Commission to determine. It is not required to accept a cost study as valid. We quote from the Court's opinion in

Atchison, Topeka & Santa Fe Railway Company v. United States, supra.

"That the Commission, in reaching this conclusion, failed to follow the expert evidence offered by the railroads in the matter of proportionate operating cost would not justify this court in annulling the order, especially as it is concededly impossible to determine with accuracy the fair proportionate cost of transporting any single kind of merchandise." (Pages 58-59.)

*We may be permitted to draw the Court's particular attention to the fact that the carriers refrained from presenting any cost studies to the District Court although ample time for their preparation was available between the date when the bill was filed and the date of the final hearing.

The Commission did not accept this study of cost, even in its first report. In its report on further consideration it particularly criticized several elements of obvious error. It rightfully rejected the cost study, saying (R. 67):

> "But we have not accepted the cost study as indicating precisely the actual expense of handling this traffic. * * *"

It is said repeatedly in appellants' brief that the Commission intentionally undertook to fix a rate that was "slightly in excess of operating expenses". (Brief of appellants, pp. 41, 68, 73, 110.) Again it is said that the Commission intentionally fixed a rate "barely above the point of confiscation". (Brief of appellants, p. 78.) The Commission's report does not warrant this characterization. The Commission said, in reply to the carriers' petition for reconsideration, that *if* the carriers' cost study were accepted it would appear that the new rates are slightly above operating expenses. But such was not the view of the Commission, since it rejected the carriers' cost study.

The appellants cite (Brief, pp. 166-167) the cases of

Banton v. Belt Line Railway Corporation, 268 U. S. 413, 69 L. ed. 1020, 45 Sup. Ct. 534 (1925);

Northern Pacific Railway Company v. North Dakota, supra;

Norfolk & Western Railway Company v. Conley, supra.

We do not take exception to the principles announced therein. The Commission's decision is in accordance with

those cases. Our objection is that a disproportionate share of operating expenses has been assigned to the deciduous fruit traffic.

There is external evidence affording another reason for rejecting this remarkable cost study. These transcontinental carriers enjoy their highest *net* earnings when the fruit movement is at the peak. (R. fol. 384-389; R. 242, 243, 373.) This is particularly noticeable in the case of such a carrier as The Western Pacific Railroad Company, whose fruit traffic represents such a large proportion of its total tonnage. As soon as its rails are crowded with fruit the net earnings rise. (Exhibits Nos. 50, 51, R. fol. 385, 387.) It will be noted that we are referring to *net* earnings, and not to gross earnings. Operating conditions are most favorable during the period when this vast fruit traffic is moving to the East. (R. 39, 241-243; Exhibits Nos. 48, 49; R. 350, 403, 408.) As the Commission has pointed out (R. 38), increased volume of tonnage properly makes for some decline in rates. The rule which the carriers would invoke is just the reverse.

The appellants contrast a supposed profit of $10.00 per car with a 6 per cent return of $15.00 upon the cost of a refrigerator car. (Brief of appellants, p. 176.) This is a naive diversion. It fails to be convincing for two reasons: *First*, it assumes the validity of the Conrad cost study; *second, it ignores the dual earning power of the refrigerator car—i. e., under the freight rate and, in turn, under the refrigeration charge.*

One additional feature should be noted in connection with appellants' charge of confiscation. The carriers are

seeking to have this Court declare these rates confiscatory solely upon the basis of evidence which was presented prior to operation under the prescribed rates. There is nothing before the Court which indicates the effect of actual operation under the rates.

The courts have evidenced extreme reluctance to set aside orders made by competent rate-making bodies, particularly by such an experienced tribunal as the Interstate Commerce Commission, in advance of a fair test of their propriety. This Court has, time and again, required the carriers to put the rates to a test. This course was required in the case of

Northern Pacific Railway Company v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. 423 (1910).

In the first instance the Court refused to annul the rates in default of a test of the rates. After a test of one year the carriers were able to present the results of actual experience. The Court then annulled the rates.

Northern Pacific Railway Company v. North Dakota, 236 U. S. 585, 59 L. ed. 735, 35 Sup. Ct. 429 (1915).

Similarly, in

Knoxville v. Knoxville Water Company, 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. 148 (1909);

Willcox v. Consolidated Gas Company, 212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. 192 (1909);

Darnell v. Edwards, 244 U. S. 564, 61 L. ed. 1317, 37 Sup. Ct. 701 (1917),

this Court refused to condemn the rates without having before it the results of a fair trial.

In the present case the carriers have been unwilling to submit these rates to the test of experience. It is perfectly clear, as we have shown, that the decline in revenue per car will not exceed $9.42, the difference between $489.42 and $480. It is not certain that there will be any decline. The carriers give no consideration to the stimulus to traffic which usually comes from a rate reduction. They are not willing to find out the actual effect of the increase in minimum carload weight. They treat it as if it did not exist and as though this were a rate reduction without any compensating advantage to them. They ask the Court to rely upon forecast merely, upon their prophecy as to the effect of this reduction in rates, and decline to give this very moderate rate reduction the test of actual experience.

V.

FINDINGS AND ORDER OF THE COMMISSION.

The Findings of the Commission are Supported by the Record and the Order is Sustained by the Findings.

The bill alleges that the Commission's findings are not supported by the record and that the order is not sustained by the findings. This charge, however, does not appear to be seriously pressed. We think it unnecessary to devote space to an elaborate review of the record in relation to the Commission's report.

On pages 102 to 107, inclusive, of their brief, the appellants criticize certain rate comparisons of complainant as

insufficient to show that the existing rates were unreasonable. It is their apparent intent to have these rate comparisons considered in dissociation from all of the other evidence which was before the Commission. No mention is made of the fact that deciduous fruit moves in solid trainloads and almost entirely over main lines. (R. 39). The deciduous fruit movement occurs at the time of most favorable operating conditions and greatest traffic density, a fact which is conducive to minimum unit operating costs. (R. 21, 39.) Furthermore, the deciduous fruit movement is notably persistent; from June 15 to November 20, 1926, there were only nine days upon which less than 100 cars of deciduous fruit were originated by the Southern Pacific and Western Pacific for eastbound movement. (R. 38.) The volume of movement is important (R. 38); deciduous fruit shipments comprise the largest single item of transcontinental tonnage. (R. 18.) It is a well recognized principle of rate-making that ton-mile earnings decrease as the length of the haul increases, by reason of the spreading of terminal costs over a greater distance. We have already pointed out that the deciduous fruit movement represents one of the longest hauls in the United States. These are some of the "unusual characteristics"* of the California deciduous fruit traffic which are not common to the other perishable traffic referred to by appellants upon pages 102 and 103 of their brief. All of the features which we have mentioned make for relatively lower rates in the case of deciduous fruit.

*In the statement of facts appearing in their brief, the appellants mention what they consider to be "unusual characteristics" of the deciduous fruit traffic. (Brief of appellants, pages 5-8). It should be borne in mind that the so-called "unusual characteristics" which the appellants list are not confined to the deciduous fruit traffic, but are common to all of the perishable traffic moving from California.

Similarly the appellants have omitted to mention traffic and transportation conditions which must be considered in comparing the rates on deciduous fruit with those on bananas, cocoanuts, and pineapples. (Brief of appellants, pages 103-104). The Commission's report shows that the Commission properly considered all of these matters, including the contention of the carriers that the banana rates were affected by water competition. (R. 32-34). The weight to be accorded this contention was a matter within the exclusive province of the Commission. The record (R. 245-257, Exhibits Nos. 62-72; R. 499-501, Exhibit No. 256) shows that both the minimum and average carload weights incident to the movement of bananas, cocoanuts and pineapples from Gulf ports are considerably below those of deciduous fruit. The average number of cars in a banana train is substantially less than in a deciduous fruit train. Bananas and cocoanuts are transported under faster schedule than are California deciduous fruits. In connection with bananas, cocoanuts and pineapples, the carriers accord free transportation of caretakers, racks, and 400 pounds of straw. In spite of all of these factors which would be expected to result in relatively lower rates in the case of deciduous fruit, *the earnings per car, per car-mile and per gross ton-mile are substantially higher under the existing rates on deciduous fruit than under the banana, cocoanut and pineapple rates.** In fact a trainload

*Exhibit No. 64 (R. 250) shows the rates on bananas and cocoanuts from New Orleans and other Gulf ports to Portland, Oregon, Spokane and Seattle, Washington, Vancouver, B.C., and Los Angeles and San Francisco, California. The average haul is shown to be 2964.8 miles, or approximately the same as the weighted average haul of California deciduous fruit, as found by the Commission (R. 31). The rate is uniformly $1.875 per hundred pounds, subject to a minimum of 20,000 pounds, and the gross car earnings are shown to be $378.56. *After deducting the terminal charges at New Orleans, which are absorbed by the line-haul carriers, the car earnings become $360.02, or materi-*

of the latter traffic yields a gross revenue of but $15,000, as compared with $29,000 derived from a trainload of California deciduous fruit. (See R. 32-34). Upon the basis of such evidence alone the Commission could readily have found the existing deciduous fruit rates unreasonable.

In addition to all of this evidence, the complainant offered comparisons of relative increases in rate levels on deciduous fruit and other commodities since June 24, 1918, —the pre-war basis. (See R. 36-37.) As compared with an increase of 50.4 per cent in the deciduous fruit rates since that date, the rates on eastbound transcontinental traffic are, on the average, but 29 per cent above the June 24, 1918, basis, while the westbound rates are only 22 per cent above that basis. This showing included 75 commodities moving eastbound and 65 commodities moving westbound. These particular rate exhibits were admitted by the carriers to represent a fair "cross-section" of the transcontinental traffic. (R. 36, 464, 467.) The relative levels of import and export rates from and to Pacific Coast ports, of rates in Mountain-Pacific territory, and of eastbound transcontinental rates on lumber, petroleum and citrus fruit were likewise shown. The existing rates on the latter were but 23, 25 and 35 per cent, respectively, in excess of the June 24, 1918, rates, as compared with an increase of 50.4 per cent in the rates on deciduous fruit.

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ally less than the carload revenue of $489.42 which the Commission found was yielded by the California deciduous fruit rates. The car-mile earnings yielded by the rates on bananas and cocoanuts here shown are found to be 12.7 cents, reduced to 12.1 cents after deducting New Orleans terminal charges. The latter figure falls far below the car-mile earnings of 16.5 cents found by the Commission in the case of California deciduous fruit (R. 31). The gross ton-mile earnings yielded by these banana and cocoanut rates are 3.63 mills, which become 3.45 mills after deducting the terminal charges. The latter figure is substantially below the corresponding earnings of 4.1 mills derived from the movement of California deciduous fruit (R. 31).

The carriers offered evidence in an effort to overcome this showing. The Commission's report shows that it took all this evidence into consideration in reaching its conclusions. (R. 36, 37.) The weight to be accorded this showing was, again, a matter for the Commission, rather than for the Court, to determine.

The appellants do not refer to the complainant's showing as to the relative levels of eastbound transcontinental express rates on fruits, berries, vegetables, butter and eggs. In *Express Rates, 1922*, 83 I. C. C. 606, 89 I. C. C. 297, the Commission ordered a reduction in these rates to a point but 27.6 per cent in excess of the pre-war basis. (R. 37-38). The appellants disregard this showing.

We have already referred to the enormous amount of evidence bearing upon rates which was before the Commission. The nature of the evidence has been summarized. A reading of the record upon which the Commission based its rate findings will suffice to show that there is abundant support for the Commission's conclusion. The case of

> *Interstate Commerce Commission v. Union Pacific Railroad, supra,*

is pertinent in this connection. We quote from page 550 of the Supreme Court's opinion:

> "* * * * For there is no possibility of solving the question as though it were a mathematical problem to which there could be only one correct answer. *Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's findings of such facts conclusive.*" (Emphasis supplied)

The point is advanced by the appellants for the first time in their brief that the Commission erroneously construed the Hoch-Smith Resolution as authorizing it to find without substantial evidence that the existing rate was unreasonable, and that the new rate was the lowest possible lawful rate. (Brief of appellants, pages 100-110.) This alleged misconstruction of the Resolution does not appear among the appellants' assignments of error. (R. 109-125.) Our answer is that the text of the report affords no warrant for this criticism.

In certain minor particulars the appellants complain of various findings which reflect evidence responsive to the terms of the Hoch-Smith Resolution. We have taken note of most of these criticisms in the course of our discussion of the Resolution. The remainder may be disposed of summarily.

It is represented that the Commission failed to find that there was a depression in the whole of the deciduous fruit industry. (Brief of appellants, page 11.) This criticism seems to us to be purely captious. By way of reply it will suffice to quote the following from page 95 of the brief of appellants:

> "That the deciduous fruit industry in California is in a state of depression is a fact beyond dispute."

The Commission did not find, as appellants represent, that there is no depression in the business of producing peaches, apricots and cherries. It did find that there had been some improvement in the market prices of these fruits, but it found no absence of depression. In point of fact, the depression extends throughout the industry. The

record so shows and the Commission so found. (R. 25, 56, 58, 59.)

The appellants state that the complainant failed to show "the general and comparative levels in market value of the various classes and kinds of commodities over a reasonable period of years." (Brief of appellants, page 154.) In fact, a showing was made of the comparative market prices of deciduous fruits over a ten-year period. (R. 23, 225, 228.) Included in the complainant's showing, furthermore, were the comparative farm values of citrus fruit, apples, vegetables and almost every other agricultural product in the State of California. (R. 22, 210, 214.) In addition, the ten principal field crops of the United States were included, covering a period of eight years. (R. 179, 212, 214.) This information was derived in part from reports of the United States Department of Agriculture. The course of those prices was plotted in relation to the course of the prices of deciduous fruits and these other California commodities. (R. 178, 179, 210, 215.) The showing was most comprehensive. Its representative character was not challenged.

Brief reference should probably be made to the appellants' contention that the Commission construed the Hoch-Smith Resolution as placing upon the carriers the burden of proving that the old rate was the lowest possible lawful rate and that the new rate was lower than the lowest possible lawful rate. (Brief of appellants, pages 100, 110, 112.) An examination of the Commission's report will fail to disclose any such irregular observation with respect to the burden of proof. The appellants endeavor to gain

support for their argument from the latter portion of the following statement contained in the Commission's report upon further consideration (R. 68):

> "On the whole record, we adhere to our former finding that the present rates are unreasonable and we are not convinced that the rates prescribed are below what are necessary to afford complainants the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

It should be borne in mind that this statement does not appear in the original report, *but was responsive to the carriers' petition for reconsideration of the original decision.* Of course, upon such a petition the carriers had the burden of convincing the Commission that its prior findings were erroneous.

The appellants quote various other fragments from the Commission's report to sustain their claim that the Commission imposed upon them the burden of proof. (Brief of appellants, pages 111, 112.) When the report is read in its entirety, it is seen that the appellants have sought to give these fragments a meaning never intended by the Commission. It will be recalled that in an earlier portion of their brief the appellants state that the language of the Commission "cannot acquire a meaning never intended by the Commission, by being lifted out of its context and segregated from the remainder of the report." (Brief of appellants, page 49.) There is nothing in the Commission's report which remotely justifies the appellants' claim that the Commission imposed upon the carriers the "burden of proof."

The findings faithfully reflect the record. The Commission's report is singularly free from error of any description. The order in turn rests upon a firm foundation. We shall rest here with the declaration that the Commission's report presents the essential matters of record in comprehensive and impartial fashion.

VI.

SCOPE OF JUDICIAL REVIEW.

A Rate-Making Order of the Commission will not be Disturbed by the Courts Unless it is Plainly in Violation of Statutory or Constitutional Restraints.

This Court has frequently stated that the fixing of rates for the future is a legislative and not a judicial function; that the Court is not an appellate rate-making tribunal; that the Court does not undertake to substitute its judgment for the judgment of the Commission; that it will not seek to determine whether upon the record before the Commission some other result might have been reached; and that the Court yields to the Commission the unfettered right to fix rates within the limits of its discretion. The findings of the Commission will not be disturbed nor will its order be set aside unless it is clearly shown that the record affords no support for the Commission's conclusions. In brief, the sole judicial function in a proceeding of this character is to determine whether or not the Commission has exceeded its province or has violated some right secured to the appellants under the Constitution of

the United States.

Illinois Central Railroad Company v. Interstate Commerce Commission, 206 U. S. 441, 454, 51 L. ed. 1128, 27 Sup. Ct. 700 (1907);

Interstate Commerce Commission v. Illinois Central Railroad Company, 215 U. S. 452, 470, 54 L. ed. 280, 30 Sup. Ct. 155 (1910).

In the latter case the Court said (page 470):

"Power to make the order, and not the mere expediency or wisdom of having made it, is the question." (Emphasis supplied.)

In

Interstate Commerce Commission v. Union Pacific Railroad Company, supra,

is found a summary of the governing principles (pages 547-548):

"There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the

substance, and not the shadow, determines the validity of the exercise of the power. * * *

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

Procter & Gamble Company v. United States, 225 U. S. 282, 297, 298, 56 L. ed. 1091, 32 Sup. Ct. 761 (1912);

Seaboard Air Line Railway Company v. United States, 254 U. S. 57, 62, 65 L. ed. 129, 41 Sup. Ct. 24 (1920);

Virginian Railway Company v. United States, *supra*.

In the latter case the following language appears (pages 665-666):

"The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.' * * * This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or

with the alleged inconsistency with findings made in other proceedings before it."

Chicago, Rock Island & Pacific Railway Company v. United States, 274 U. S. 29, 33, 54, 71 L. ed. 911, 47 Sup. Ct. 486 (1927).

The proposition is impregnably established that the rate-making orders of the Interstate Commerce Commission will not be disturbed by the courts unless they are plainly in violation of statutory or constitutional restraints.

The presumptions of regularity and validity which are accorded to the acts of the Commission in administering its functions are properly to be extended to its administration of the Hoch-Smith Resolution. As a tribunal "appointed by law and informed by experience," the validity of its processes will be assumed unless irregularity clearly appears. We can find no such evidence of irregularity in the report.

SUMMARY AND CONCLUSION.

The order of the Commission proceeds from the normal exercise of its rate-making functions. The rates assailed were found unreasonable under Section 1 of the Act upon an ample record, comprehending a comparative analysis of the rates on perishable products throughout the country, a survey of changes in the transcontinental rate structure since June 24, 1918, and a study of traffic, transportation and financial conditions. The findings are sus-

tained by the record and the order is supported by the findings.

The Commission has not required a rate reduction in obedience to the supposed desire of Congress as expressed in the Hoch-Smith Resolution. It has found previously existing rates unreasonable in accordance with accepted and approved standards, and has prescribed rates for future application within the limits of the zone of reasonableness.

The Commission has not held that the Hoch-Smith Resolution creates "a new and different standard of reasonableness"; instead it has expressly concluded that the Resolution "sets no new standard of lawfulness". The Commission has not held that it has authority to reduce an existing rate on agricultural products, notwithstanding that the existing rate is reasonable and otherwise lawful. It has held instead that all provisions of the Act, including Section 1, must be observed.

The Commission has neither misconstrued nor misapplied the Hoch-Smith Resolution. It is competent for the Commission to entertain a complaint against rates on agricultural products and, after finding them to be unreasonable upon sufficient evidence, to require a readjustment without awaiting the conclusion of the nation-wide investigation of the rate structure.

The rates prescribed by the Commission are not confiscatory. The cost studies upon which appellants rely are characterized by fallacies in their preparation which grossly exaggerate the cost of service. The appellants cannot demand the acceptance of a cost study predicated

upon costs prevailing in 1923 when it affirmatively appears that, at the time of hearing and decision, costs had materially declined. Moreover, a cost study which is based upon a limited test on the line of a single transcontinental carrier is inconclusive. The law does not require that all traffic shall contribute in equal proportion to indirect costs and to the carriers' profits. It is sufficient if freight rates upon a particular commodity shall make provision for all costs which can be directly assigned, a fair proportion of other costs together with a reasonable profit.

Rate-making orders of the Commission will not be disturbed unless it affirmatively appears that the Commission has exceeded statutory authority, has acted without substantial evidence or has disregarded Constitutional restraints.

Respectfully submitted,

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Dated at San Francisco, California,
February 11, 1929.

Receipt of a copy of the foregoing is hereby acknowledged on this.....day of February, 1929.

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Attorneys for Appellants,
The Ann Arbor Railroad Company, et al.

Receipt of a copy of the foregoing is hereby acknowledged on this.....day of February, 1929.

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Attorney for Appellee,
Interstate Commerce Commission.

Receipt of a copy of the foregoing is hereby acknowledged on this.....day of February, 1929.

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Attorney General of the United States.